DEPARTMENT OF THE ARMY PAMPHLET 27–100–64

MILITARY LAW REVIEW VOL. 64

Articles

TERRORISM AND THE INTERNATIONAL LAW OF WAR
PROOF OF THE DEFENDANTS CHARACTER

Perspective

THE HISTORY OF THE TRIPOD OF JUSTICE

Comment

THE BUY AMERICAN ACT: EXAMINATION, ANALYSIS AND COMPARISON

Foreign Military Law Commentary

THE MILITARY JUDICIAL SYSTEM OF THAILAND

HEADQUARTERS, DEPARTMENT OF THE ARMY SPRING 1974

MILITARY LAW REVIEW

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SUBSCRIPTIONS AND BACK ISSUES: Interested persons should contact the Superintendent of Documents, United States Government Printing Office, Washington, D. C. 20402. Subscription price: $5.90 a year, $1.55 for single copies. Foreign subscription, $7.45 per year.

REPRINT PERMISSION: Contact Editor, *Military Law Review,* The Judge Advocate General's School, Charlottesville, Virginia 22901.

This Review may be cited as 64 MIL. L. REV. (number of page) (1973).

PAMPHLET
NO. 27—100—64

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHISGTON, DC, *Spring* ***1974***

MILITARY LAW REVIEW—VOL. 64

TERRORISM AND THE INTERNATIONAL LAW OF WAR*

Jordan J. Paust**

I. INTRODUCTION

Recent events in the international social process have forced the community to consider how to better protect mankind from the scourge of international terrorism. Although some states have recently questioned the need for a total ban on all forms of international terrorism, all seem to share the view that the world community must reach an agreement which prohibits terroristic acts that are contrary to the principles of the United Nations Charter and to other goal values (policies) shared by the international community. Primary efforts are being made to reach a working consensus on a definitional framework, to consider the adoption of a treaty prohibiting international terrorism in general or of treaties prohibiting certain specific types of international terrorism (such as terror attacks on civilian populations, diplomats, air transport facilities, communications facilities, international governmental facilities, educational institutions, cultural and religious edifices, medical units and facilities, food production and distribution processes, etc.), to identify and consider the underlying causes of international terrorism, and to consider various implementary measures at both the national and international levels for the coordinated prevention and punishment of terroristic acts of an impermissible nature that have an international impact.[1]

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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1 For a general coverage of these developments see U.N. S.G. Report, Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, And Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes, 27 U.N. GAOR, U.N. Doc. A/C.6/418, Annex I (2 Nov. 1972) [hereinafter cited as U.N. S.G. Report A/C.6/418]. U.N. ***Ad Hoc*** Committee on International Terrorism, Observations of State Submitted in Accordance with General Assembly Resolution 3034(XXVII), U.N. Doc. A/AC.160/1 and Adds. 1-5 (May-July 1973) [hereinafter

Interspersed among these efforts is a specifically articulated realization by at least some twenty per cent of the states that norms of international human rights are directly relevant to the current effort to articulate an authoritative distinction between permissible and impermissible terror of an international nature if there are to be any permissible types;' but only a handful of states, in addition to the Secretary General of the United Nations, have articulated a realization that the law of war or the law of human rights in time of armed conflict, is directly relevant as well.[3] The United States Draft Convention for the Prevention of Certain Acts of International Terrorism.' had at least recognized the applicability of the law of war to the legal regulation of terrorism in the context of an armed conflict; but, curiously. had completely abdicated the matter to a normative regulation, at least in that context, by the law of war. Indeed, Article 1(1)(c) of the U.S. Draft Convention sought to exclude acts committed by or against "a member of the armed forces of a State in the course of militarv hostilities," and Article 13 quite properly stated that the 1949 Geneva Conventions shall "take precedence" in the case of a conflict with the Draft Convention on Terrorism, but added:

> Nothing in this Convention shall make an offence of any act which is permissible under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War or any other international law applicable in armed conflicts.

It is one thing to say that the Geneva law takes precedence in case of a conflict, but the effect of the second phrase of Article 13 is at least specifically niore far reaching than one might normally

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cited as U.N. Doc, A/AC.160/1]; U.N. S.G. Report, Analytical Study, Observations of States, U.N. Doc. A/AC.160/2 (June 22, 1973); and U.N. *Ad Hoc* Committee on International Terrorism, 28 U.N. GXOR, Supp. No. 28, U.N. Doc. A/9028 (Sept. 1973) [hereinafter cited as *Ad Hoc* Committee Report]. For a survey of possible implementary measures *see* J. Paust, *Possible Legal Responses to International Terrorism: Prevention, Punishment and Cooperative Action,* forthcoming.

2 *See* U.N. Doc. A/AC.160/1 and Adds. 1-5; and *Ad Hoc* Committee Keport. Included here are: Canada, Cyprus, Denmark, Federal Republic of Germany, Greece, the Holy See, Italy, Japan, Luxembourg, Spain, Sweden, United Stares. Uruguay, and Venezuela.

3 *See id.* Included here are: Canada, Israel, Norway, Sweden, and Yugoslavia. One might add the United States because of the reference to the law of war in its Draft Convention for the Prevention of Certain Acts of International Terrorism, U.N. Doc. A/C.6/L.850 (Sept. 25, 1972), *reprinted ut* 67 DEP'T STATE BULL. 431 (Oct. 16, 1972) [hereinafter cited as U.S. Draft Convention on Terrorism].

4 *Supra* note 3.

infer from the use of the phrase shall "take precedence" in connection with Geneva law conflicts. The import of such a specific exception to the Draft Convention on Terrorism lies in the fact that regardless of what conduct is prohibited in the Draft Convention the action is not to be considered illegal if it occurs during an armed conflict and is otherwise permissible or unregulated under both Geneva law and other norms of the international law of war. Thus, it becomes extremely important to consider what is and is not permissible under the law of war in order to understand what would be the full effect of such an article in a general Convention on Terrorism in the context of an armed conflict. It is also necessary to note that, although the problem of terrorism has been dealt with in the past under the law of war, it would be useful to identify any present gaps in regulation as well as recent claims of exception from coverage.

First, it is most useful to begin the inquiry with a general perspective of international terrorism as a process and, then, to briefly explore the applicable normative prohibitions found today in the law of war. With this beginning, one can identify and interrelate certain general expectations of the international community and also explore the changes in perspective recently articulated by some members of the community in an effort to justify exceptions to a general proscription against terroristic conduct. Finally, an exploration can be made of the gaps or potential ambiguities which may exist in coverage by the law of war of all forms of terror in the battle context.

II. DEFINITIONAL FRAMEWORK

At the outset, a general definitional framework is disclosed so that readers may pursue the inquiry with the author on a shared footing. Moreover, it is not the purpose here to provide an in-depth analysis of definitional criteria, but it is nevertheless felt that the absence of a working definition could lead to confusion or ambiguity in a manner not unlike the debate carried on so far in the General Assembly and the literature. Terrorism is viewed here as one of the forms of violent strategies which are themselves a species of coercion utilized to alter the freedom of choice of others. The terroristic process—terrorism—involves the purposive use of violence or the threat of violence by the precipitator(s) against an instrumental target in order to communicate to a primary target a threat of future violence so as to coerce the primary target into behavior or attitudes through intense fear or anxiety in connection

with a demanded power (political) outcome. It should be noted that in a specific context the instrumental and primary targets could be the same person or group of persons. For example, an attack could be made on a military headquarters in order to instill terror or intense anxiety in the military elite of that headquarters. Additionally, the instrumental target need not be a person since attacks on power stations can produce a terror outcome in the civilian population of the community dependent upon the station for electricity.

There must be a terror outcome or the process could hardly be labeled as terrorism, a realization which seems to have eluded some of the U.N. debaters, but there are fine lines for juridical distinction to be made between fear and intense fear outcomes although in many cases the type of strategy could well be prohibited under different normative provisions of the law of war. For example, an attack upon or hijacking of a civil aircraft in the zone of armed conflict which produces no terror outcome among the crew, passengers or others may nevertheless violate prohibitions against attacks upon noncombatants or the taking of hostages as well as new international treaty norms governing hijacking. The point, however, is that this cannot properly be referred to as terrorism—perhaps attempted terrorism in some cases—and present definitions which refer merely to "acts of violence," "repressive acts," "violent acts of a criminal nature" (full of circuitous ambiguity per se), "a heinous act of barbarism," are strikingly incomplete. It may also be noted that terrorism can be precipitated by governments, groups or individuals so any exclusion of one or more sets of precipitators from the definitional framework is highly unrealistic. Equally unrealistic are definitional criteria which refer to "systematic" uses of violence, since terrorism can occur at an instant and by one act. Indeed, the law of war already makes no distinction between singular or systematic terroristic processes, governmental or nongovernmental precipitations, or governmental and nongovernmental targets, if distinctions in permissibility result, it is usually the result of a conscious policy choice and not a definitional exclusion in the fashion of an ostrich, Similarly unhelpful definitional criteria include: "unjust" activity, atrocious conduct, arbitrariness, irrationality, indiscriminate, selective and unexpected. Terror can be caused by an unintended act and terror can occur in connection mith a demanded wealth or other nonpolitical outcome (motivation), but such events are not the purpose of this inquiry and do not seem to be those considered by the community.

III. GENERAL PRINCIPLES OF LAW AND TRENDS IN RELEVANT EXPECTATIONS

With this definitional framework in mind, the next matter of initial inquiry concerns certain general principles of law applicable to international terrorism in the broad sense not merely to terrorism in armed conflicts. One should recognize that not all strategies for violent coercion are permissible;[5] and that the "justness" of one's political cause does not simplistically "justify the means" utilized.[6] Indeed, the Secretary General has put it more directly in his report on international terrorism:

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5 See, *e.g.*, U.S. S.G. Report A/C.6/418 at 7 and 41. Even in time of war, when power struggle is at its greatest intensity, it has long been a basic expectation of man that there are limits to allowable death and suffering and that certain normative protections are peremptory. See, *e.g.*, Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, preamble and art. 22, 36 Stat. 2277, T.S. No. 539; League of Nations, *Treaty Series* vol. XCIV (1929) No. 2138 [hereinafter cited as H.C. IV]. *See also* R. Rosenstock, ***At*** *The United Nations: Extending the Boundaries of Int'l Law*, 59 A.B.A.J. 412, 413 (Apr. 1973); J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REI'. 99, 139-143 (1972), and references cited; U.N. S.G. Report, Respect for Human Rights in Armed Conflicts, 25 U.N. GAOR, U.N. Doc. A/8052 (1970) [hereinafter cited as U.N. S.G. Report A/8052]; G.A. Res. 2675, XXV (Dec. 1970), *reprinted nt* 119 INT'L REV. OF THE RED CROSS 104, 108-109 (1971); U.N. S.G. Report, Respect for Human Rights in Armed Conflicts, 24 U.N. GAOR, U.N. Doc. A/7720 (20 Nov. 1969) [hereinafter cited as U.N. S.G. Report A/7720]; G.X. Res. 2444, 23 U.N. GAOR, Supp. 18, at 50, U.N. Doc. A/7218 (1969), condemning indiscriminate warfare, attacks on the civilian population as such and refusals to distinguish between "those taking part" in the hostilities and those who are not; U.S. DEP'T OF ARMY, FIELD MANUAL No. 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter cited as FM 27-10]; and H. Lauterpacht, *The Problem of the Revision* of *the* ***Low*** *of War*, 29 BRIT. YRBK. I.L. 360, 369 (1952) on the peremptory norm against intentional terrorization of the civilian population, as such, not incidental to lawful military operations.

6 Here as elsewhere the theory that "the ends justify the means" is refuted. See *supra* note 5; and U.N. S.G. Report A/C.6/418 at 41. See also 1971 O.A.S. Convention to Prevent and Punish the Acts of Terrorism taking the form of crimes against persons and related extortion that are of international significance, 2 Feb. 1971, art. 2 T.S. No. 37, O.A.S./Ser. A/17, O.A.S./Off. Doc. AG/88 rev. 1; *reprinted at* U.S. S.G. Report A/C.6/418 at Annex V (not yet in effect) [hereinafter cited as 1971 OAS Convention on Terrorism]; Convention for the suppression of unlawful acts against the safety of civil aviation, 23 Sept. 1971, arts. 7 and 8 (ratified or acceded to by some 11 states) [hereinafter cited as 1971 Montreal Convention]; *reprinted at* U.N. S.G. Report A/C.6/418 at Annex IV: Convention for the suppression of unlawful seizure of aircraft, 16 Dec. 1970, arts. 7 and 8 (ratified or acceded to by some 46 states including the US.) [hereinafter cited as 1970 Hague Convention], *reprinted nt* U.N. S.G. Report A/C.6/418 at Annex III; O.A.S. Res. 4, O.A.S. Doc. AG/Res. 4(I-E/70) (June 30, 1970), *reprinted nt* U.N. S.G. Report

> At all times in history, mankind has recognized the unavoidable necessity of repressing some forms of violence, which otherwise would threaten the very existence of society as well as that of man himself. There are some means of using force, as in every form of human conflict, which must not be used, even when the use of force is legally and morally justified, and regardless of the status of the perpetrator.:

Another relevant trend in expectation has excluded the offense of terrorism from "political" crimes in connection with norms of extradition;[8] and relevant human rights instruments allow no exception to human rights protections on the basis of a postulated

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A/C.6/418 at 36, and 9 (ASIL) INT'L LEG. MAT. 1084 (1970), stating: "The political and ideological pretexts utilized as justification for the crimes in no way mitigate their cruelty and irrationality or the ignoble nature of the means employed, and in no way remove their character as acts in violation of essential human rights"; and Convention on offenses and certain other acts comrnitteed on board aircraft, 11 Sept. 1963, art. 2, implying an exclusion of any exceptions to prosecution on the basis of purpose or "political" offense (ratified or acceded to by some 62 states including the U.S.) [hereinafter cited as 1963 Tokyo Conventionl. *reprinted at* U.N. S.G. Report A/C.6/418, Annex II. For other relevant references which refute the simplistic "ends justify the means" myth *see, e.g.,* M. McDOUGAL, F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, 72, 80 ns. 194-195, 134-135, 186-188, 521-524 and 529 (1961) [hereinafter cited as McDOUGAL, FELICIANO]; II OPPENHEIM'S INTERNATIONAL LAW 218 (Lauterpatch ed., 7 ed. 1952); FM 27-10, para. 3(a); J. PICTET (ed.), IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVIL PERSONS IS TIME OF WAR 15-16, 34, 37-40 and 225-226 (1958) [hereinafter cited as J. PICTET, IV COMMENTARY]; United States v. List, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 66 (1949); United States v. von Leeb, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93-94 and 123 (1949); and H. HALLECK, INT'L LAW 426 (1861).

7 U.N. S.G. Report A/C.6/418 at 41.

8 Early work on terrorism prior to 1937 included drafts which specifically excluded terrorism or related acts from "political" offenses and created a criminal offense where the purpose was to "propound or put into practice political or social ideas" or "commit an act with a political and terroristic" purpose, thus pointing tu the exclusion of the offense from the category of "political" crimes for extradition purposes. *See* U.N. S.G. Report A/C.6/418 at 11, 13, 16 and 22. Furthermore, many extradition treaties have excluded terrorism froni "political" offenses; see *id.* ar 16-21. The 1937 Convention for the Prevention and Punishment of Terrorisni. 16 Nov. 1937, 19 LEACCE OF NATIONS OFF. J 23 (1938), arrs. 1, 9-10 and 19 :hereinafter cited as 1937 Convention on Terrorism], would seem tu fit within this trend; and so would the United States Draft Convention on Terrorism, arts. 2-4. 6 and 7. The new US-Cuba Agreement on Hijacking also seems to exclude the offense listed from the category of "political" crimes for purposes of extradition (and this seems the whole purpose of the agreement). *See* U.S. Dep't of State. Press *So.* 35, "Text of Sore Signed 'Today by Secretary of State William P. Rogers Containing Agreement with Cuba on Hijacking," articles First and Fourth (Feb. 15, 1973).

political purpose in cases of conduct which would amount to acts or threats of terrorism.[9] It is worth emphasizing that even Marx, in sharp contrast to those who feign to follow him on a blood-filled battlefield, had declared in a clear and trenchant manner: "An end that requires unjust means is not a just end."

It cannot be overemphasized that this recognition of legal restraints on violent coercion and the unacceptability of "just" excuses per se is a key to the efficacy of norms proscribing terroristic strategies; for without a shared acceptance of these two basic premises, law can have little effect on the participants in the power process and they will increasingly defer to raw, violent power as the force and "just" measure of social change.[10] Numerous examples of claims to utilize any means of violence, to expand permissible target groups or to

[9] For example, even though the European Convention on Human Rights allows certain derogations under specified conditions, it affirms that no derogation is permissible from articles 2 (except "lawful" acts of war) and 3 or from other international obligations (such as H. C. IV or the 1949 Geneva Conventions). The Convention adds that nothing shall imply any right for any state, group or person to derogate from the rights and freedoms of persons set forth in the Convention or to limit such rights to a greater extent than is provided in the Convention. ***See*** 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 15 and 17, 213 U.N.T.S. 221 (1950) (arts. 2 and 3 prohibit conduct most often connected with terrorism). Similar absolute prohibitions against conduct which includes terroristic acts appear in other human rights instruments. ***See*** 1969 American Convention on Human Rights, arts. 4-5, 8, a5, a7, 29 and 32 (not yet in effect), ***reprinted at*** 65 AM. J.I.L. 679-702 (1971); 1966 Covenant on Civil and Political Rights, arts. 6-7 and 4(1) and (2), adopted by G.A. Res. 2200, 21 U.N. GAOR, Supp. 16, at 52-58, U.N. Doc. A/6316 (1966) (vote: 106-0-0) (not yet in effect); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, arts. 3, 4, 13, 16, 27-33 and 147 (1956), 6 U.S.T. 3516, T.I.A.S. No. 3365; 75 U.N.T.S. 287 [hereinafter cited as G.C.]. Note also that these prescriptions do not depend on reciprocity between contending participants in a particular arena for their force and effect, but are obligations to mankind (or at least to regional persons) and state provisional characterizations of persons and protections are subject to community review. ***See*** MCDOUGAL, FELICIANO at 218-219; U.N.S.G. Report A/C.6/418 at 6-7 and 40-41; U.N.S.G. Report A/7720 at 31; and J. PICTET, IV COMMENTARY at 15-17, 21, 23, 34, 37-40 and 225-229.

[10] The concept of law adopted here recognizes the interplay between patterns of authority and patterns of control and that "authority" is ultimately based in the shared expectations of all members of the living human community. Decisions which are controlling but not based at all on authority are not law but naked power. ***See*** H. Lasswell, M. McDougal, ***Criteria For A Theory About Law,*** 44 S. CAL. L. REV. 362, 384 (1971) and references cited, ***id.*** at 380 n. 36 and 390 n. 40. See also J.N. Moore, *Prolegomenon to the Jurisprudence* of ***Myres McDougal and Harold Lasswell,*** 54 VA. L. REV. 662 (1968), and references cited, ***id.*** at 664 n. 3. Terrorism motivated by "blind fanaticism, or . . . the adoption of an extremist ideology which subordinates morality and all other human values to a single aim"

excuse human rights deprivations on the basis of a "holy" or "just" macro-political purpose appear in recent writings. and misconceptions of legal norms and goal values (policies) are far too frequent in legal literature." Moreover, much of the philosophic literature

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or the dominance of parochial political dogma by coercive violence is, of course, rejected. *See,* U.N.S.G. Report A/C.6/418 at 9, para. 18; and "Air Piracy Curb Signed By Nixon," Wash. Post, Nov. 2, 1972, at 7, col. 3, quoting the President: "A civilized society cannot tolerate terrorism. . . . Any action which makes a diplomat, a government official or any innocent citizen a pawn in a politically motivated dispute undermines the safety of every other person." *See also* Sec. Rogers, "A World Free of Violence," 67 DEP'T STATE BULL. 425, 429 (Oct. 16, 1972), stating that terrorist acts "must be universally condemned, whether we consider the cause the terrorists invoke noble or ignoble, legitimate or illegitimate"; and statement of M. Feldman, Assistant Legal Adviser for Inter-Am. Aff., Dep't of State, Executive Report *So.* 92-93 to Senate Committee on Foreign Relations, 92d Cong., 2d Sess., *Convention to Prevent and Punish Acts of Terrorism* 4 (June 5, 1972).

11 *See, e.g.*, W. Lawrence, *The Status Under Int'l Law of Recent Guerrilla Movements in Latin America,* 7 INT'L LAWYER 405 (repeating the false myth that the law of war did not consider guerrilla tactics or revolutions), 406 (repeating the myth that support of the people is necessary for terrorists to come to power), 407 (stating that it is objectionable to require guerrillas to follow the law), 408 (falsely stating, in effect, that no guerrilla movements have met the requirements of H.C. IV, Annex, art. 1 or can in the future), 413 (repeating the last falsehood), and 420 (arguing for a reprisal right in case of an article 3 conflict contrary to shared expectation) (A.B.A. 1973); A. Rubin, *The Status of Rebels Under the Geneva Conventions* of 1949, 21 INT'L & COMP. L.Q. 472, 481 (1972); T. FARER, *The Laws* of *Wnr 25 Years After Nuremberg* 42-43 (1971); and R. FALK, *Six Legal Dimensions of the United States Involvement in tht Vietnam War,* II THE VIETNAM WAR ASD INT'L LAW 216, 240 (R. Falk ed. for XSIL 1969), stating that the insurgent-guerrilla has no alternative other than terror to mobilize an effective operation. The incongruence of these claims with present and inherited legal expection and the goals of human dignity and minimum world public order, and the inaccuracy of related guerrilla "myths" is sufficiently explored in J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility, supra* note 5, at 128-146. See also E. Rosenhlad, *Starvation as a Method of Warfare—Conditions for Regulation by Convention,* 7 INT'L LAWYER 252, 258 and 267 (1973); G. Schwarzenberger, *Terrorists, Guerrilleros and Mercenaries,* 1971 UNIV. OF TOLEDO L. REV. 71 (1971); T. Meron, *Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy* 1-10 and 25-28 (Tel Aviv 1970); T. TAYLOR, NUREMBERG AND VIETNAM: AS AMERICAN TRAGEDY 17, 22, 39-41, 136-137, 145, and 192-195 (1970); G. Wales, *Algerian Terrorism,* 22 NAVAL WAR COLL. REV. 26 (1969); W. Ford, *Resistance Movements and Int'l Law* (ICRC reprint 1968) (reviewing several customary trends, opinions of scholars and relevant cases); U.N. S.G. Report A/C.6/418 at 7 and 41; J. PICTET, IV COMMENTARY at 15-16, 31, 34, 37-40 and 225-226 (concerning the peremptory prohibition of terrorism); P. BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS 229-231 (1908); H. HALLECK, INT'L LAW 386-387, 400-401 and 426-427 (1861); and H. G. VON MARTENS, THE LAW OF NATIONS 287 (Cobbett trans., 4 ed.

of certain revolutionaries contains "argument" (and not much profound thinking) that violence permeates all societies and institutions (everyone is doing it); man is exploited, tyranized, alienated (they're doing it to you); violence is a cleansing force and frees the alienated (you can resist and benefit from your own psychodrama); and violence **is** "necessary" in politics or for the dominance of one's own political predilection (you can do it and you can win).[12] A typical statement is that of Marcuse, that violence used to uphold domination is bad but violence practiced by the "oppressed" against the "oppressor" is good.[13] Although the average terrorist would probably be convinced by that statement, once one begins to map out the types of participants, perspectives, arenas of interaction, resource values, strategies employed, outcomes and effects in con-

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1829). This is not the place for a more elaborate exploration, but it should be noted that Mr. Lawrence's conclusions about the general "humanitarian" nature of Latin American guerrillas and their "discriminating" tactics, see *supra* at 406 and 418-419, can be questioned; and he deleted certain references in Che Guevara's cited work, ***supra*** at 406 n. 2, concerning the harassment of cities with concomitant paralysis and distress to the entire population and certain "ruthless" tactics therein elaborated. On this point he also ignored the 1970 resolution of the O.A.S. Inter-American Commission on Human Rights, which condemned acts of political terrorism and of urban or rural guerrillas as being grave violations of human rights and fundamental freedoms. OAS/Ser.L/v/II.23, Doc. 19, Rev. 1, 23 Apr. 1970; see also U.N. S.G. Report A/C.6/418 at 35-39.

12 See, *e.g.*, M. CRANSTON (ED.), PROPHETIC POLITICS: CRITICAL INTERPRETATIONS OF THE REVOLUTIONARY IMPULSE (1970). This work is useful for a concise reference to relevant claims by Che Guevara, Frantz Fanon, Jean-Paul Sartre, Herbert Marcuse, Ronald Laing and others, and for a critical analysis of those claims from political, sociological, historical and philosophical perspectives.

13 *See* ***id.*** at 11; and H. MARCUSE, FIVE LECTURES 89-90, 93 and 103-104, cf. ***id.*** at 79 (1970). For a related claim by the state (the Soviet Union), see, *e.g.*, CONTEMPORARY INTERNATIONAL **LAW** ***6*** and 13 (G. Tunkin ed. 1969). For a recent evidence of insurgent practice along these lines see "Argentine Guerrillas Vow More Attacks," **N.Y.** Times, May 28, 1973, at 3, col. 6. **It** is not difficult to realize why the Soviets are prone to accept neo-Machiavellian theories that the ends (political) justify (legally) the means when it is known that part of the Leninist ideological tradition has been that morality is entirely subordinated to the interests of the proletarian class struggle—that its principles "are to be derived from the requirements and objectives of this struggle." H. MARCUSE, SOVIET MARXISM—A CRITICAL ANALYSIS 199 and 201 (1961). At least here Marcuse seemed highly critical of this approach, stating that "the means prejudice the end" and that the "end recedes, the means becomes everything; and the sum total of means is 'the movement' itself. It absorbs and adorns itself with the values of the goal, whose realization 'the movement' itself delays." ***Id.*** at xiv and 225. See also M. OPPENHEIMER, **THE** URBAN GUERRILLA 50, **57,** 59-60, 63-64, 66, 69, and 161 (1969); A. CAMUS, THE REBEL 209, 292 (the means justify the end), passim (1956); and the declaration of Marx in the text, *supra*, p. 7.

nection with the "violence" in society and the strategies of "resistance" by the "oppressed," one should begin to ask a few questions and to reject such simplistic justifications for all sorts of violent strategy. Actually, not only is there insufficient guidance in the words "oppressed" and "oppressors," as with the errant meaning of the word "just," but necessarily the "oppressed" who use coercive violence are going to become the "oppressors" of someone else or some other thought so the "guidance" leaves us in circular confusion and mankind in a ridiculous spiral pursuit of self-destructive terror and counter-terror.[14] To add simplistically that terrorism is "necessary" so that the "will of the people" can be expressed is similarly unattractive and incredulous as a generality. An intentionally created terror necessarily suppresses a free expression of all viewpoints and a free participation of all persons in the political process.[15]

With such simplistic analyses of social and political process and conclusions of the "necessity" of violent revolution, it is not difficult to predict sweeping generalizations concerning the necessity of terrorism and transpositive notions of legality. These types of analytic inquiry and conclusions are, of course, also made by certain advocates of the "new" Right who seem to find their pleasure in an equally repugnant guardianship of the people. What is harder to understand is why some lawyers contribute to the abnegative claims that "just" or "good" (in their hearts) groups or guerrillas can ignore the law—especially international norms governing armed conflict and human rights.[16]

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14 *See* U.N. *S.G.* Report A/C.6/418 at 9 and 41; and G. Schaarzenberger, *Terrorists, Guerrilleros, and Mercenaries, supra* note 11, at 76. See aiso McDOUGAL, FELICIANO at 79-80, 652 and 656-658; and authorities cited *infra* note 26.

15 See also text *infra* re: self-determination.

16 *See, e.g.*, W. Lawrence, *The Status Under Int'l Law* of *Recent Guerrilla Movements in Latin America, supra* note 11 at 407-409, stating that the inclusion of the requirement that guerrillas observe the rules of warfare is "highly objectionable," "unlikely" and an "unbelievable" condition for pw status or recognition of the state of belligerency while adding that "the only essential condition" should be POlitical recognition (apparently deferring to politicized conclusions or raw power), T. FARER, THE LAW OF WAR 25 YEARS AFTER NUREMBERG, *supra* note 21, at 42-43 (concerning terrorism); and R. Falk, *Six Legal Dimensions* of *the United States Involvement in the Vietnam War, supra* note 11, at 240. Mr. Lawrence's observations and goal values of human indignity necessarily intertwined with the deference to power are not surprising when we recognize that his teacher was Professor Rubin. *See* A. Rubin, *The Status* of *Rebels Under the Geneva Conventions of 1949, supra* note 11 at 476-479 for a surprising (knowing the ability and views of this author) textualist abhorrence of word ambiguity (or "meanings" which do not jump out

Those willing to explore the relevant juristic effort of mankind will find that recent trends in prescription and authoritative pronouncement which are themselves additional forms of legal response to terrorism have been sufficiently clear in recognizing that there are limits to permissible death, suffering and competitive destruction, no matter what the cause or type of participants. A basic human expectation incorporated into the customary law of war has been that even in times of extensive competition by arms (armed conflict) mankind expects that each party to the conflict will conduct his operations in conformity with the laws and customs of war. It has also long been generally expected that these norms "do not allow to belligerents an unlimited power as to the choice of means of injuring the enemy" [17] and that a respect for the law is not merely owed to the enemy but to all mankind. Furthermore, there is respected authority for the position that the customary law of war and practice have prohibited terrorism as an intentional strategy.[18] Moreover, there were at least two commissions estab-

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of the document and pound on the head of the reader) which has led some to run from past and present context, identifiable goal values and shared expectations with defeatist warnings of the unworkability of rules and arguments that "ambiguities" must necessarily force us into a restrictive or myopic and textualist approach to interpretation or to some form of cowing to raw power and community inability to judge the claims of imaginative word jugglers who seek to derogate from the shared goals of human dignity. I would strongly recommend that the reader confronted with such "arguments" examine M. McDOUGAL, H. LASSWELL, AND J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967).

17 See Project of an International Declaration Concerning the Laws and Customs of War, Adopted by the Conference of Brussels, Aug. **27, 1874,** arts. 9(4) and 12, ***reprinted at*** I AM. J.I.L., SUPP. **96, 97-98 (1907).** These expectations of law and custom were reiterated in the **1899** and **1907** Hague Conventions. ***See*** Hague Convention with respect to the Laws and Customs of War on Land, arts. 1(4), **2** and **22** (1899), ***reprinted at*** I AM. J.I.L., SUPP. **129,** 134–135 and **142 (1907);** and H.C. **IV,** Annex, art. **22.**

The Hague Conventions were considered customary at Nuremberg; ***see*** FM **27-10,** para. **6;** and Judgment of the I.M.T., I T.M.W.C. **221** and **254** (1947). See also WINTHROP, MILITARY LAW AND PRECEDENTS **778-779** (2 ed. **1920)** [hereinafter cited as WINTHROP].

18 ***See*** Q. Wright, ***The Bombardment*** of ***Damascus,*** **20** AM. J.I.L. **263, 273 (1926);** ASIL Report, Subcommittee No. 1, ***To restate the established rules*** of ***international law,*** **1921** PROCEEDINGS OF THE ASIL **102, 104** (1921), stating that "treacherous killings, massacres and terrorism are not allowed by the laws of war;" I J.W. **GARNER,** INT'L LAW AND THE WORLD WAR **283 (1920);** E. STOWELL, H. MUNRO, INT'L CASES **173-176 (1916);** and II WHEATON'S ELEMENTS OF INT'L LAW **789-790** (6th ed. **1929).** See also the **1818** trial of Arbuthnot and Ambrister, III WHARTON'S **DIG.** OF THE INT'L LAW OF THE US. **326, 328 (1886);** and the Code of Articles of

lished early in the 20th Century for the purpose of articulating the established norms of the law of war and they identified a widespread denunciation of terrorism as well as murder, massacres, torture and collective penalties.[19] A third group charged with the investigation of the German control of Belgium in World War I concluded that a deliberate "system of general terrorization" of the population to gain quick control of the region was contrary to the rules of civilized warfare, and that German claims of military necessity and reprisal action were unfounded.'" The pre-World War I German Staff and jurists had openly favored terrorization of civilians in war zones to hasten victory or in occupied territory to insure control of the population;" but these views and implementary actions during the War were widely denounced as unlawful strategies."

King Gustavus Xdolphus of Sweden, art. 97 (1621), *reprinted at* WINTHROP 907, 913, stating that no man shall "tyrannize over any Churchmen, or aged people, men or women, maides or children, unless they first take up arms . . ." This prohibition grew into the customary prohibition of any form of violence against noncombatants, *See* WINTHROP at 778 and 843 (concerning the case of the "anarchist" Pallas, tried by a court-martial at Barcelona in September, 1893).

[19] *See Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors* of *tbe War and on Enforcement and Penalties*, List of War Crimes, items no. 1, 3 and 17 (1919) (copy at United States Army TJAG School) (members were: U.S., British Empire, France, Italy, Japan, Belgium, Greece, Poland, Romania, Serbia); and XSIL Report, *supra* note 18. It was not clear whether all form of violent terrorism (including terrorization of combatants not in force control) were denounced, but a general ban on terrorism was affirmed along with other strategies generally utilized only against combatants or against both combatants and noncombatants (*i.e.*, assassination, use of prohibited weapons, treachery, etc.)

[20] See Report of the Bryce Committee, 1914, *extract* ***at*** E. STOWELL, H. MUNRO, INT'L CASES 173 (1916). The Bryce Report added that the murder of large numbers of innocent civilians is "an act absolutely forbidden by the rules of civilized warfare"; *id.* at 176.

[21] For a brief consideration of the German jurists and the Prussian War-book *see* T. BATY, J. MORGAN, WAR: ITS CONDUCT AND LEGAL RESULTS 176 and 180-181 (London 1915). Karl von Clausewitz in 1832 had favored terrorizing the occupied populace including a spread of the "fear of responsibility, punishment, and ill-treatment which in such cases presses like a general weight against the whole population . . ."; see *id.* at 180 n. 1; and I. J.W. GARNER, INT'L LAW AND THI WORLD WAR 278-282 and 328 (1920). Garner added that it was "entirely in accord with the doctrines of the German militarists that war is a contest . . . against the civil population as well, that violence, ruthlessness, and terrorism are legitimate measures, and that whatever tends to shorten the duration of the war is permissible;" *supra* at 328. It is not clear whether Baty and Morgan repudiated the German views; but most other writers did. *See* J. W. GARNER, *supra* at 283.

[22] *See, e.g.*, E. STOWELL, H. MUNRO, ***supra*** note 20; J.W. Garner, *supra* note 21

Despite this background on the general prohibition of terrorism, however, Stowell had identified a problem in connection with air bombardment that was of great importance. He placed this problem before the community in 1931 when he stated that he recognized that under inherited expectations "the shocking inhumanity of acts of terrorism was rightly considered to be disproportionate to the military advantage to be derived from their use," but "the conditions of modern warfare as exemplified in the last war have given rise to serious doubts" concerning the condemnation of acts against the civilian population "intended to break down the stamina of the civilian population and to cause them to become so weary of further resistance that they would induce their government to sue for peace." [23] He also stated that an "impartial observer must recognize that the last war constitutes a precedent for directing operations against the civilian population in order to make them crave peace, and induce their government to submit." [24] But, he added, a study should be made of this problem in terms of these modern conditions of war, the military impact of such usages, which can be considerably high, the psychological outcomes among the civilians, which can be considerably grave, and the long-term effects of such a strategy "on the post-war survival of natural animosities and bickerings which will render the preservation of peace much more difficult." [25] This was an important insight by Stowell for he had thus predicted a massive aerial bombardment of civilian populations, difficult decisional questions and the need for a more comprehensive focus in order to achieve the most rational, realistic and policy-serving type of decisions in actual context. With similar

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at **283;** II WHEATON'S ELEMENTS OF INT'L LAW **789-790** (6th ed. **1929);** and France, Ministry of Foreign Affairs, GERMANY'S VIOLATIONS OF THE LAW OF WAR, 1914-**1915** at **77-215** (J. Bland trans, **1915).** *Cf.* **E.** STOWELL, INT'L LAW **523-526** (1931), arguing for a reconsideration of the German claim of permissible terror in cases where the principle of military necessity applies and warning of a "precedent" for a World War II calamity which he could only dimly envision and would not deny. The **1949** Geneva Conventions would prohibit all acts of terrorism against protected persons regardless of military necessity claims, but Stowell's remarks were significant with respect to certain World War II bombardments which were most likely permissible then but would be condemned today. See MCDOUGAL, FELICIANO at **79-80** and 652-657.

[23] See E. STOWELL, INTERNATIONAL LAW **524 (1931).**

[24] *Id.* at 525. See also J. GARNER, RECEST DECELOPMESTS IN INTERNATIONAL LAW **174** (Calcutta **1925);** and J. Garner, ***Proposed Rules for the Regulation of Aerial Warfare,* 18** AM. J.I.L. **56, 65, (1924)** (but in each case expressing the desire for a prohibition of such acts).

[25] *See* STOWELL, *supra* note 23, at **524** n. 2, 525 n. **4** and **526.**

claims being made today by certain precipitators of terror among civilian targets in many sectors of the world and intense debate on the propriety of such conduct, it seems that we need a similar focus in order to reach any sort of consensus and to thus initiate an effective preventive and sanctioning effort by the community. At least now we have a more extensive documentation of human rights, both general and in times of armed conflict, for policv guidance.

In fact, since World War 11 distinguished authorities have recaptured the need for a peremptory norm which prohibits the intentional terrorization of the civilian population as such or the intentional use of a strategy which produces terror that is not "incidental to lawful" combat operations.[26] Underlying these viewpoints are policy considerations involving the need for limiting the types of permissible participants and strategies in the process of armed violence and a shared awareness of the need to prohibit the deliberate terrorization of populations in order to preserve any "vestige of the claim that war can be regulated at all" and to save from extinction the "human rights" limitations on the exercise of armed coercion within the social process.[27]

As if to reaffirm these trends in expectation, the 1949 Geneva Conventions contained a specific peremptory prohibition of "all measures" of "terrorism,"[28] and numerous humane treatment pro-

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[26] *See H.* Lauterpacht, *The Problem* of *the Revision* of *the Law* of *War*, 2 BRIT, YRBK. I.L. 360, 378-379 (1952); MCDOUGAL, FELICIANO at 79-80, 652 and 656-658; Carnegie Endowment for Int'l Peace, REPORT OF THE COSFERESCE *os* CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 39, 42 (1971); and J. W. GARNER, RECENT DEVELOPMENTS IN INT'L LAW 174 (Calcutta 1925). *Cf.* E. STOWELL, INTERNATIONAL LAW 524-526 (1931). Present support for a peremptory prohibition of international terrorization of noncombatants would also seem to come from: Professor R. Baxter, G.I.A.D. Draper, Professor J. Freymond, M. Greenspan, Professor H. Levie, T. Meron, J. Pictet, G. Schwarzenberger, Dr. H. Meyrowitz, Professor E'. Dinstein and others. *See* T. Meron, *Some Legal Aspects* of *Arab Terrorists' Claims to Privileged Combatancy*, *supra* note 11; I and III ISRAEL YRBK. os H.R. (1973); and G. Schwarzenberger, *Terrorists, Guerrilleros, and Mercenaries*, *supra* note 11 at 73-76.

[27] *See supra* note 26.

[28] G.C., art. 33. See also J. PICTET, IV. COMMENTARY at 225-226 and 594. This article is technically applicable only to noncombatants in the terror process since "protected persons" are defined in article 4. The article is also specifically applicable in case of an armed conflict of an international character including a civil war between "belligerents" (an article 2 conflict). *See* FM 17-10, para. 11(a); II OPPENHEIM at 370 n. 1; and HALLECK, ELEMENTS OF INT'L LAW AND LAWS OF WAR 151-153 (1866) concerning the applicability of the lam of war to civil war between "belligerents." Respected authority states that terrorism is also prohibited in an

visions prohibit these and related acts of violence in all circumstances. Specific prohibitions include: violence to life and person, cruel treatment, torture, the taking of hostages, summary executions and other forms of murder or punishment without judicial safeguards, outrages upon personal dignity, and humiliating and degrading treatment.[29] A nonabsolute ban on all forms of "physical or moral coercion" against protected persons is also contained in the Conventions, and Pictet states that the prohibition is very broad although the drafters "had mainly in mind coercion aimed at obtaining information, work or support for an ideological or political idea."[30] Coercion of a violent or violence threatening nature to induce behavioral or attitudinal outcomes in the primary target, either the captured person or some "home" audience, in connection with an effort to gain "support for an ideological or political idea" is, however, just the sort of thing envisioned in the definitional framework provided above. The specific interrelated Geneva prohibitions mentioned above can also be viewed as means or strategies employed during a terroristic process in order to produce the desired outcome; and, thus, torture and inhumane treatment prohibitions become extremely relevant in limiting the possible methods one might seek to employ in carrying out a terroristic process. Recent efforts to supplement the Geneva Convention norms through two new Protocols have also contained specific reiterations of the prohibition of terrorism as well as the prohibition on any other form of armed violence directed at the civilian population as such.[31] Included in a 1972 ICRC Draft were "terrorization attacks" and "acts of terrorism, as well as reprisals against persons." An early 1973 Draft included changes such as: "acts and measures that spread terror,"

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article 3 conflict (not of an international character), and it seems sufficiently clear that those who follow article 3 will not commit acts of terrorism against noncombatants. See J. PICTET, IV COMMENTARY at 31 and 40.

[29] *See, e.g.*, G.C., arts, 3, 16, 27, 31-34 and 147, and GPW, arts. 13, 17 and 130. Common article 3 contains each of these.

[30] See G.C., art. 31; and J. PICTET, IV COMMENTARY at 219-220. See also GPW, arts. 13, 17 and *99*. Permissible derogations from this ban must serve other Geneva policies. See J. PICTET, IV COMMENTARY at 219-220.

[31] *See, e.g.*, ICRC, I BASIC TEXTS, Protocol I, art. 45, and Protocol II, art. 5 (Jan. 1972) (proposed draft Protocols to the Conventions, Conference of Governmental Experts, Geneva 3 May-3 June 1972), concerning specific prohibitions of "terrorization attacks" and "acts of terrorism." These prohibitions appear in articles designed to protect the general population and individual noncombatants against the dangers of armed conflict in both article 2 and 3 types of conflict (international and noninternational).

"attacks that spread terror among the civilian population and are launched without distinction against civilians and military objectives" [32] and "violent acts of terrorism perpetrated without distinction against civilians who do not take a direct part in hostilities." [33] If properly framed, the new prohibitions of terrorism in the Geneva Protocols will be important because they might help to implement customary and current expectation prohibiting *attacks* on the civilian population as such, whereas the present Conventions primarily protect persons already in control of the military force or in occupied territory and the wounded, infirm, women, children or "other persons" who are "exposed to grave danger." [34]

Similar trends in expectation have developed within the interconnected sphere of human rights contained in norms other than the law of armed conflict. Whether the 1474 trial of Peter von Hagenback fits into developing trends of human rights, the law of war or norms prohibiting the dominance of other people and territory by a "regime of arbitrariness and terror," is not important for this inquiry. The significance of the decision for our focus stems from the indicia of an early community condemnation of a government by terror as being an egregious defiance of "the laws of God and man." [35] In that case, the arrant denial of shared expectation necessitated community military action and the trial of captured perpetrators.

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[32] It is doubtful that the "and" is meant as a condition or that attacks with distinction or discriminate attacks on civilians is meant to be approved.

[33] Again, it is doubtful that this sloppy draftsmanship contains an intended permissibility of discriminate attacks on noncombatants.

[34] It should be noted that most of those protected by G.C., art. 4 are those in force control ("protected persons"); however, article 4 also refers to Part II of the Convention and to a broader group of persons protected by articles 13 and 16, for example, ("persons protected"). See J. PICTET, IV COMMENTARY at 50-51 and 118-137; and J. Paust, *Legal Aspects of the My Lai Incident: A Response to Professor Rubin*, 50 ORE. L. REV. 138 (1971), *reprinted* at III THE VIETNAM WAR AND INTERNATIONAL LAW 359 (R. Falk ed. for ASIL 1972). No such "in the hands of" or control limitations attach to common article 3 of the Conventions and its prohibitions apply "in all circumstances" including "any time" and "any place" whatsoever. See also J. PAUST, A. BLAUSTEIN, WAR CRIMES TRIALS AND HUMAN RIGHTS: THE CASE OF BANGLADESH (Praeger 1974).

[35] See II G. SCHWARZENBERGER, INT'L LAW 462-466 (1968). The ancients had used terror to dominate others, but by the time of Vattel this was condemned. See III R. PHILLIMORE, COMMENTARIES UPON INT'L LAW 73 (3 ed. London 1879); and J. MACQUEEN, CHIEF POINTS IN THE LAWS OF WAR AND NEUTRALITY 1-2 (London 1862), adding that "cruelty, pillage and marauding, though practised largely in the first Napoleon's wars, have no sanction from any modern jurist."

Related claims to control the population of occupied territory in times of war through a process involving the taking of hostages and their execution in response to local population resistance have been authoritatively denied after both World Wars. After the Second World War it was further declared that the executions of hostages without strict compliance with reprisal principles and certain minimum judicial safeguards "are merely terror murders" and are impermissible regardless of a "reprisal" or other objective.[36] Now the Geneva Conventions also prohibit the taking of hostages in any type of armed conflict and for any purpose.[37] To serve a similar policy, they also prohibit collective penalties and reprisals against protected persons, no matter what the postulated need of those engaged in the armed struggle.[38]

Today it also seems reasonable to conclude that all forms of violent terrorism against noncombatants and captured persons and the governmental or private terrorization of others in order to coerce them from a free participation in the governmental process would violate human rights expectations documented in numerous international instruments. The 1948 Universal Declaration of Human Rights stated that "[elveryone has the right to life, liberty and security of person" and that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[39] This is the same type of language contained in the 1949

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[36] *See* United States v. von Leeb, 10 TRIALS OF WAR CRIMINALS 1, 11 T.W.C. 528 (1948), adding that it might be impermissible to execute hostages under any circumstances. *Cf.* United States v. List, 11 T.W.C. 757, 1250 (1948).

[37] *See* G.C., arts. 3, 34 and 147; GPW, arts. 13, 84-85 and 130; and J. PICTET, IV COMMENTARY at 35-40, 229-231 and 596-601.

[38] *See* G.C., arts. 27 and 33; and J. PICTET, IV COMMENTARY at 199-202, 205 and 224-229. These prohibitions are arguably applicable to an article 3 conflict as well even though no specific mention of reprisals or collective penalties exists in the article. See J. PICTET, IV COMMENTARY at 34 and 39-40. In any event, it would be a very limited type of "reprisal" or "collective penalty" that could survive the absolute ban on hostages, murder, cruel treatment, torture, outrages upon personal dignity, other forms of inhuman treatment, and summary executions or the "passing of sentences" without regular court proceedings. Indeed, in view of the purpose of the article and the last mentioned form of prohibition it would seem that collective "penalties" are also prohibited unless such is actually beyond the connotation of the phrase in that a personal guilt of each accused has been somehow determined by an authoritative judicial body utilizing fair procedure. See also J. PICTET, IV COMMENTARY at 225.

[39] U.N. G.A. Res. 217 A, 3 GAOR, U.N. Doc. A/810, at 71, arts. 3 and 5 (1948). This is the 25th Anniversary of the Declaration and many scholars view it as an evidence of customary law. See J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL

Geneva Conventions, and it would seem to document a similar expectation of the prohibition of all forms of terrorism through acts of .violence to persons or threats thereof.[40] Similar language also appears in the 1966 Covenant on Civil and Political Rights[41] and two regional human rights conventions.[42] In addition to these trends in the documentation of human rights, other authoritative pronouncements have declared that acts of terrorism constitute serious violations of the fundamental rights, freedoms and dignitv of man.[43] The U.N. Secretary General has added that "terrorism threatens, endangers or destroys eke lives and fundamental freedoms of the innocent," [44] and a recent resolution of the U.N. General Assembly stated that that body was at least "deeply perturbed'' over acts of international terrorism which take a toll of innocent human lives or jeopardize fundamental freedoms and human rights.[45] In

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RIGHTS 13-14 (1970), *citing* the 1968 Montreal Statement. See *also* U.S. G.X. Res. 3059 (XXVIII) (Nov. 2, 1973) (adopted unanimously), rejecting "any form of torture and other cruel, inhuman or degrading treatment or punishment"—apparently also rejecting, then, any excuse; see *supra* note 6.

40 This type of language appears in common article 3 of the Geneva Conventions, and respected authority asserts that it is broad enough to cover acts specifically prohibited in other articles such as acts of terrorism. See J. PICTET, I\' COMMENTARY at 3 and 40. Detailed prohibitions contained in G.C., art. 3 but not necessarily in the 1948 Declaration as such include: taking of hostages and mutilation. See also 1948 Universal Declaration, arts. 2, 10 and 11; and U.N. G.A. Res. 3059 (XXVIII) (Nov. 2, 1973).

41 U.N. G.A. Res. 2200A, 21 U.N. GAOR, Supp. 16, at 52, arts. 6(1) and 7, U.N. Doc. A/6316 (1966) (vote: 106-0-0) (not yet in effect). Note that article 4(2) prohibits all derogations from this basic expectation. One wonders, however, if some claims to terrorize combatants not in force control could survive this blanketing prohibitory language through policy inquiry and a comparison with developed expectations concerning the law of war (note that the lam of war may not forbid *all* terrorism). Since the human rights provisions apply to all persons and no derogation is allowed from relevant articles even in times of war or grave public danger, the presumption may lie with a peremptory prohibition (with respect to all participants).

42 *See* European Convention on Human Rights, arts. 2 and 3, U.N.T.S. 221 (1950); and American Convention on Human Rights, arts. 4, 5, 7(1) and 11(1) (1969), *reprinted at* 65 AM. J.I.L. 679 (1971) (not yet in effect). These regional human rights conventions also prohibit all derogations from the listed articles; see arts. 15(2) and 27(2) respectively.

43 *See* O.A.S. Res. 4, O.A.S. Doc. A G/Res. 4(I-E/70) (June 30, 1970), *reprinted at* 9 (ASIL) INT'L L. MAT. 1084 (1970); and U.N. S.G. Report A/C.6/418 at 35-39, also *citing* the 1970 Inter-American Commission on Human Rights resolution on terrorism.

44 U.N. S.G. Report A/C.6/418 at 41. See ***also id.*** at 6.

45 U.N. G.A. Res. 3034, 27 U.N. GXOR, U.N. Doc. A/RES/3034 (1972) (vote:

1969 the Red Cross Istanbul Declaration also provided that "it is a human right to be free from all fears, acts of violence and brutality, threats and anxieties likely to injure man in his person, his honour and his dignity."[46] Necessarily included in such a ban would be acts of violent terrorism.

Not only do human rights expectations seem to prohibit almost all forms of violent terrorism *per se*, but terrorism utilized as a strategy to coerce others from a free and full participation in the governmental process would undoubtedly offend norms designed to assure a full sharing of power in the political process for all participants in the social process and the full sharing of enlightenment or the free exchange of ideas.[47] These fundamental human goals are supplemented by specific human rights references to equality, the impermissible distinction of persons on the basis of conflicting political or other opinion,[48] and the shared principle of self-determination. Indeed, terrorism, as a strategy to coerce others through violence, offends not only the free choice of the whole people but the freedom and dignity of the individual.[49] Such a

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76-35 (U.S.)-17). The author feels that the split of votes was not due to the perspective outlined here. *See* "U.S. Votes Against U.N. General Assembly Resolution Calling for Study of Terrorism," 68 DEP'T STATE **BULL.** 81, 87-89 (Jan. 22, 1973). It should be noted that the word "innocent" is not a very useful criterion for distinction; nor does terrorization of the "guilty" leave mankind much better off. *See* ***supra*** note 22 and *infra*.

[46] XXIst Int'l Conference of the Red Cross, Res. XIX (Istanbul 1969), ***reprinted at*** 104 INT'L REV. OF THE RED **CROSS** 620 (1969). See also J. PICTET, THE PRINCIPLES OF INTERNATIONAL LAW 34-36 (1966); and Final Act of the International Conference on Human Rights, Res. XXIII (Teheran, April-May 1968).

[47] *See* 1948 Universal Declaration, arts. 18-19 and 21; 1966 Covenant on Civil and Political Rights, arts. 18-19 and 25; 1950 European Convention on Human Rights, arts. 9-10 (*cf.* art. 16), and Protocol I, art. 3; and 1969 American Convention on Human Rights, arts. 6(1), 12-13, 16(1) and 23.

[48] *See* 1948 Universal Declaration, arts. 1-2; 1966 Convenant on Civil and Political Rights, arts. 2(1), 3 and 18(2); 1950 European Convention on Human Rights, arts. 1 and 14; and 1969 American Convention on Human Rights, arts. 1 and 24.

[49] *See* O.A.S. Res. 4, *supra* note 43, stating that acts of terrorism constitute crimes against humanity, serious violations of the "fundamental rights and freedoms of man" or "essential human rights," and flagrant violations of "the most elemental principles of the security of the individual and community as well as offenses against the freedom and dignity of the individual"; U.N. S.G. Report A/C.6/418 at 7, 9 and 41, stating that "terrorism threatens, endangers or destroys the lives and fundamental freedoms of the innocent"; and J. Irwin II, Letter of Submittal, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION TO PREVENT ASD PUNISH THE ACTS OF TERRORISM TAKING THE **FORM** OF CRIMES AGAINST PERSONS AND RELATED EXTORTION THAT **ARE** OF INT'L SIGNIFICANCE, Executive D, at

coercive interference with the political process is an attempt to deny the full sharing of power by all participants in the given social process, or the denial of a "determination" by an aggregate "self."[50] Moreover, when such attempts at elitist dontrol of the political process are made by parties or states outside of the particular social process (especially a state boundary) such "exported" terrorism for that purpose would offend norms governing intervention. More specifically, a widely recognized prescription with customarv background declares that:

> Every state has the duty to refrain from organizing, instigating. assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts. . .[51]

A similar prescription prohibits related attempts to "organize, assist, foment, finance, incite or tolerate subversive, terrorist or other armed

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3, Senate, 92d Cong., 1st Sess. (May 11, 1971). See also Ambassador Bennett, "U.S. Votes Against U.N. General Assembly Resolution Calling for Study of Terrorisni," *supra* note 45, at 81-83 and 92; G.A. Res. **3031,** 27 U.N. GAOR, U.N. Doc. A/RES/3034, art. 4 (Dec. 18, 1972) (vote: 76-35(U.S.)-17) (re: governmental terrorism and human rights); and Secretary Rogers, "**.**IWorld Free of Violence," ***supra*** note 10, at 429.

50 *See* 1970 Declaration Concerning Friendly Relations and Cooperation, U.N. G.A. Res. 2625, 25 U.N. GAOR, Supp. 18, at 122-124, U.N. Doc. A/8028 (1970); Universal Declaration of Human Rights, arts. 21(1) and 21(3); U.N. G.A. Res. 2131, Declaration on the Inadmissibility of Intervention, *infra* note 51; and 1966 Covenant on Civil and Political Rights, arts. 1 and 25(a) and (b).

51 U.N. G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 25 U.N. GAOR, Supp. 18, at 122-124, U.N. Doc. A/8028 (1970) (elaborating expectations connected nith U.N. CHARTER, art. 2(4) and adding: "when the acts referred to in the present paragraph involve a threat or use of force"). See also Draft Convention on Terrorism, preamble and art. 10(1); 1971 O.A.S. Convention on Terrorism, art. 8(a); 1971 Montreal Convention. art. 10(1); 1937 Convention on Terrorism, arts. 1(1) and 3; U.N. G.A. Res. 2131, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 20 U.N. GAOR, Supp. 14, at 11-12, U.N. Doc. A/6014 (1965) (vote: 109-0-1(U.K.)); and Draft Code of Offenses Against the Peace and Security of Mankind, art. 2(4), (5), (6) and (13), 9 U.N. GAOR, Supp. 9, at 11-12, U.N. Doc. A/2693 (1951) (adopted by the **U S** ILC). See also *League of Nations Covenant* art, 10; I OPPENHEIM'S INT'L **LAW** 292-293 (8 ed. 1955) and II OPPENHEIM'S INT'L LAW 698, **701** and 751-754 (7 ed. 1952). For comments on the 1970 Declaration Concerning Friendly Relations *see, e.g.*, U.N. S.G. Report A/C.6/418 at 27-29; and R. Rosenstock, *The Declaration of Principles* of *International Law Concerning Friendly Relations: A Survey,* 65 AM. J.I.L. **713** (1971).

activities;" [52] and the United Nations Secretariat has stated that a punishable act should include the incitement, encouragement or toleration of activities designed to spread terror among the population of another state.[53] The above prescriptions are also supported by a long history of expectation usually categorized in terms of aggression or intervention.[54]

In view of the numerous documented expectations prohibiting acts of violence relevant to the terroristic process one might conclude that any new convention on terrorism will only reaffirm these trends and would be most significant for its procedural mechanisms for implementation.[55] Already supplementing the law of armed conflict and human rights, of course, are the more specific air hijacking and sabotage conventions[56] and the regional O.A.S. Convention on Terrorism.[57] But, one might ask, if there are numerous norms prohibiting terrorism in armed conflicts, as well as in certain other contexts, then why are there still problems ahead for the complete, rational and policy-serving regulation of terrorism in times of armed conflict? First, there is a minority of states which has recently articulated certain claims for an exception to the seemingly complete ban on terrorism during armed conflict; and second, there are hidden gaps within the present coverage of this matter by

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[52] 1970 Declaration Concerning Friendly Relations and Cooperation, *supra* note 51. This prescriptive elaboration is listed under a section on U.N. Charter, art. 2(7).

[53] *See* U.N. S.G. Report A/C.6/418 at 26. This would include individual criminal sanctioning and such individual responsibility can be found in numerous examples of current expectation or traced to customary law as is the 1818 case of Arbuthnot and Ambrister. *See* III WHARTON's, DIG. OF INT'L LAW 326 (1886).

[54] *See, e.g.,* U.N. S.G. Report A/C.6/418 at 30; ***supra*** notes 51-52; II Oppenheim at 656, 678-680, 698, 704, 751-754 and 757-758; Q. Wright, ***Subversive*** *Intervention,* 54 AM. J.I.L. 521, 533 (1960); II G. HACKWORTH, DIG. OF INT'L L. § 155, at 334-336 (1941); and United States v. Arjona, 120 **U.S.** 479 (1887).

[55] If this is true, then the main focus of this article and the author's other one cited *supra* note 1 should allow the reader to test the new efforts put before the United Nations in terms of Convention proximity to implementary needs and realistic possibilities.

[56] These are the 1963 Tokyo, 1970 Hague and 1971 Montreal Conventions, *supra* note 6.

[57] *Supra* note 6. Note that article 1 articulates the undertaking of the Contracting Parties to prevent and punish all acts of terrorism, although the Convention's main aim seems to lie in the protection of "persons to whom the State has the duty to give special protection according to international law" (notably diplomatic personnel). Do protected persons under the Geneva Conventions qualify? It would not seem to matter in view of the Geneva prohibition of terrorism and the Geneva obligations upon all signators and parties to take affirmative protective measures. See J. PICTET, IV COMMENTARY at 45-51, 133-135, 201-205 and 225-226 on this point.

the law of war. Moreover, although it appears that almost any form of terrorism will thwart some basic policy of human dignity or world public order, there may still be some overriding case of "necessity" which balances against a normal prohibition if the community has not already placed an absolute ban on the particular activity. All relevant legal policies have to be considered as well as all relevant features of context. Some of the claims which follow result from attempts to ignore all relevant policies and circumstances and this unavoidable need for rational choice.

IV. RECENT DIVERGENT CLAIMS

Apparently in direct conflict with their pledges to respect and to ensure respect for an absolute ban on terrorism against civilians protected by the Geneva Civilian Convention, there are claims being made by some states that community efforts to regulate terroristic acts should not apply in the context of a national liberation movement where a people are legitimately seeking self-determination.[58] It is difficult to judge, however, how many states make this sort of claim in connection with the general debate on international terrorism. Some fourteen states seem to openly take a similar stance, but upon close inspection many of these merely claim that a ban on international terrorism "should not affect" the inalienable right to self-determination and independence of all peoples or "the legitimacy of their struggle" (or words of similar effect).[59] Such a claim

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[58] *See* U.N. Doc. A/AC.160/1 and Adds. 1-5; and *Ad Hoc* Committee Report. Included here (with some uncertainty as to actual position) are: Byelorussian Soviet Socialist Republic(?), Cyprus, Czechoslovakia, Greece(?), Italy(?), Lebanon, Nigeria, Norway(?), Romania(?), Syrian Arab Republic, Ukranian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yemen Arab Republic, Yugoslavia. Sweden would seem to wish to exclude this context as well by its unacceptable, conclusionary definition of what is "international" (in apparent disregard of U.N. CHARTER, art. 2(7) consequences for human rights efforts). See U.N. Doc. A/A.C.160/1 at 32-33.

[59] It should be noted that the Sonaligned Group in the *Ad Hoc* Committee (Algeria, Congo, Democratic Yemen, Guinea, India, Mauritania, Nigeria, Syrian Arab Republic, Tunisia, United Republic of Tanzania, Yemen, Yugoslavia, Zaire and Zambia) expressed the view that the ban on terrrorism "*should not affect* the inalienable *right to* self-determination and independence . . . *and the legitimacy* of *their struggle,* in particular the struggle of national liberation movements, in accordance with the purpose and principles of the Charter . . ." (emphasis added). Some of the members of the Nonaligned Group seem to actually have taken a much stronger position elsewhere; see *supra* note 58 (*i.e.*, Nigeria, Syrian Arab Republic, Yugoslavia). Note that a struggle "in accordance with the purposes and

seems merely to affirm that an otherwise legitimate use of force or overall struggle for self-determination should not itself be considered as an impermissible terroristic process per se.[60] With this, the author must agree. But, then, it would seem that no claim is being made by even these states that during such a self-determination struggle *any* means of force including terroristic strategies directed against civilians protected under the Geneva Civilian Convention is to be permissible in that context. With such a claim, the author would have to totally disagree and it has already been disclosed that the end does not simplistically justify any means to that end. Each claim as to the permissibility of terrorism would have to be analyzed in terms of the actual context with a comprehensive reference to: participants, perspectives, base values or resources, situations of interaction, strategies utilized, actual outcomes and long-term effects, as well as the goal values involved, impacts upon goal value realization, and so forth.[61] There are a few states which seem

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principles of the Charter" would most certainly seek to respect and to ensure respect for human rights in times of armed conflict (plus general human rights). See U.N. CHARTER, preamble and arts. 1(2) and (3), 2(4), 55(c) and 56.

[60] Note that a claim that an otherwise permissible process of political change should not itself (as a whole be banned because of its terror impact is far different than a claim that any means utilized during such a process should be legitimate when they are analyzed as separate strategies. It seems quite likely that most states which mention self-determination or national liberation movements wish to claim only that the overall process should not be impermissible because of some terror impact. The author notes that the mere accumulation of terror producing strategies that are separately impermissible into a movement should not result in a conclusion of permissibility. Thus, the author wishes to reserve judgment on self-determination processes with the remark that they should not be impermissible per se because of some terror impact. Each process would have to be examined in terms of all relevant goal values and the actual context. ***Contra*** U.N. S.G. Report A/C.6/418 at 7, stating: "The subject of international terrorism has . . . nothing to do with the question of when the use of force is legitimate. . ." Moreover, because of the author's concept of authority and legitimate self-determination (by all participants in a freely determined process), see ***supra,*** the author finds the remarks of Czechoslovakia which condemn acts of "individual" terrorism "as a means to achieve revolutionary aims" quite compatible with his own view. See **U.N.** Doc. A/A..C.160/1/Add. 2 at 3. See ***also*** U.N. Doc.A/A.C.160/1 at 3, for the apt statement of Austria that "acts of individual violence should be condemned . . . since they, by their very nature, infringe upon the right of self-determination of those peoples whose Governments become the object and aim of such terroristic acts and jeopardize peaceful and constructive relations between States."

[61] See, ***e.g.,*** MCDOUGAL, FELICIANO, ***passim;*** and ***supra*** note 10. See ***also*** U.N. G.A. Res. 3166 (XXVIII) (Dec. 14, 1973), adopting the new Convention on the Prevention and Punishment of Crimes against Internationaily Protected Persons,

to have specifically claimed that *any* means utilized in such a self-determinative process, if not in an elitist attempt to control the ideological and political perspectives and events in a given social process—a form of dominance, should be legal; but their uncompromising and extreme viewpoints seem thus far to have convinced no one else.[62]

Another related type of claim recently coming into focus[63] is that any means utilized to confront an "aggressor" should be permissible or excluded from a ban on terroristic acts of international significance.[64] Of course, there is a well documented international consensus, inherited and present, that is opposed to such a claim and in modern times it has been fairly consistently expected that no exception to the coverage of the law of war should be made on the basis of the "aggressor" status or "unjust" quality of the actions of one or more of the parties to a particular armed conflict. Underlying this expectation is a recognition that it is often difficult to determine which party is an aggressor, that without an authoritative determination on such a matter each party to the conflict might refuse to apply the law of war to the other parties to the conflict in the context of conflicting assertions and escalating inhumanity, and that the law of human rights in times of armed conflict is designed to assure protection to all noncombatants regardless of race, colour, religion, faith, sex, birth, wealth, political opinion

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including Diplomatic Agents, recognizing that the Convention "could not in any way prejudice the exercise of the legitimate right to self-determination. . ."

62 *See* U.N. Doc. A/A.C.160/1 and Adds. 1-5; and ***Ad Hoc*** Committee Report. They have left no other feasible interpretation. Included are: Cyprus, Czechoslovakia, Lebanon, Nigeria, Syrian Arab Republic, Ukranian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yemen Arab Republic, Yugoslavia. Note that the Union of Soviet Socialist Republics is included here while the Byelorussian Soviet Socialist Republic is not (surely an oddity) because of the Byelorussian use of general terms such as movements, opposition and assertion of rights, whereas the U.S.S.R. refers to acts and action (presumably any acts or means within the struggle, opposition or assertion of rights). More specifically, Yugoslavia refers to an exclusion of interference "in any way" with struggles and an approval of the carrying on of a struggle "with all means at their disposal" (similar statements come from Cyprus, Czechoslovakia, Lebanon, Nigeria, Syrian Arab Republic, Yemen Arab Republic).

63 Made only by three entities: Czechoslovakia, Ukranian Soviet Socialist Republic, Union of Soviet Socialist Republics.

64 *See* U.N. Docs. A/A.C.160/1/Add. 1 and Add. 2. Close positions are those of Lebanon and the Syrian Arab Republic which refer to a situation where a people is fighting "to reconquer usurped territories, to drive out an invader," or to seek "the liquidation of foreign occupation."

or similar criteria and is a law built upon the expectancy of an obligation owed to all of mankind rather than to the mere number of participants actually involved in the fray.[65] Moreover, the goal values covered in that law are deemed too important to give way to such a claim and most norms are of a peremptory nature allowing for no derogation on the basis of state status, political or ideological pretext, military necessity or state or group interest unless specifically so stated for a particular prescription.

Regardless of the final acceptance or nonacceptance of such a claim in connection with the efforts to prohibit international terrorism in general, it seems clear that in connection with the regulation of terrorism under the law of war such a claim is doomed to failure in view of the widely shared and inherited expectations of the community and the important goal values at stake which provide a necessary backbone for all human rights.

A third claim of a related nature might seek to exclude the context of a struggle by workers from terroristic regulation.[66] Undoubtedly the lack of any adherents to this view beyond the Soviet frontiers will lead to its demise in the general debate. Although a little more specific than references to "oppressors" and "oppressed," this worker struggle exception suffers from a similar criteria1 ambiguity, though I am sure that the Soviets could call them as they see them for the rest of us if the community wanted to be left to such an uninclusive fate. Suffice it to say here that this claim has never been specifically raised in a law of war context and there does not seem to have ever been demonstrated any shared policy reason why "workers" should be allowed to terrorize everyone else.

A fourth claim of a related nature that has not appeared in recent general debates on international terrorism, but which has arisen in the context of efforts to revitalize certain provisions of the law of war, is that the means employed by insurgent guerrillas in a guerrilla war or armed conflict, including the terrorization of noncombatants, should be permissible.[67] Some have even advocated that in a guerrilla warfare context all participants should be allowed to escape the regulation of the law.[68] Both of these claims are minority

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65 See, *e.g.*, ***supra*** notes 5, 6, 9 and 59.

66 See U.N. Docs. A/A.C.160/1/Add. 1 and Add. 2. Advocates include: Byelorussian Soviet Socialist Republic, Ukranian Soviet Socialist Republic, Union of Soviet Socialist Republics.

67 See ***supra*** notes 11-13; and U.N. S.G. Report A/8052 at 56-57 (view of "some of: the ICRC experts").

68 See ***id.***

viewpoints and both run counter to a customary law and Geneva law which recognize no sweeping exception for guerrillas or guerrilla warfare.[69] Indeed, as disclosed elsewhere by the author with a more comprehensive analysis of the issues involved, the law of war was developed with both a guerrilla warfare and an insurgent/belligerent power struggle experiential and policy formulative background; adherence to its norms and goal values will more greatly assure the fulfillment of human rights, the lessening of indiscriminate suffering, the protection of noncombatants, restraint upon armed violence, the abnegation of raw power as the measure and force of social change, a human freedom from inhumane or degrading treatment, and the serving of all other policies intertwined with human dignity and minimum world public order.[70]

It seems that none of these four types of claimed exceptions will find community approval for law of war contexts. They are all extreme forms of attempted exception which seek to exclude a whole context of violent interaction from legal regulation rather than to advocate a particular policy for authoritative decisional balancing or the regulation of all contexts with deference to certain policies in the case where conflicting policies present themselves with an otherwise relatively equal weight. If the community chooses to give a strong policy weight in favor of self-determination, for example, then that preference should be balanced in terms of actual context, actual conflicts with other goal values, and the decisional questions familiar to law of war specialists which are generally categorized in terms of "military necessity," "proportionality," and "unnecessary suffering." Where, however, higher preference has been demonstrated for certain human rights goal values such as the peremptory Genera law protections, these preferences should continue to balance against claimed "self-determination" exceptions to an applicable ban on terrorism. Thus, one should identify all goal values at stake in a given context of armed violence and also align the goal values for decisional consideration in terms of peremptory goals, higher order goals, lower order goals, etc. (and make these choices known). This type of approach might well lead to a con-

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69 See *id.*

70 *See* J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility, supra* note 5 at 128-146; and *J. Paust, Law In A Guerrilla Conflict: Myths, Norms and Human Rights,* III ISRAEL YRBK. ON HUMAN RIGHTS **(1973).** See also U.N. S.G. Report A/7720 at 51-55 and 118-128; U.N. S.G. Report A/8052 at *56-73,* and ICRC, 1 BASIC TEXTS 15 (Protocol I, art. 38) and 40 (Protocol II, art. *25)* (Geneva Jan. **1972).**

clusion that a specific form of a self-determination process is permissible in general even though its outcome is somewhat of a terroristic nature, but also lead to a conclusion that within such a self-determinative process a particular attack on a civilian population is impermissible in view of the peremptory goal values which regulate the means of carrying on any armed conflict. Another conclusion that seems possible is that within that general process, conflict or struggle, a terroristic attack on "counter" participants of a military character, in a specific subcontext, can be permissible. This brings up the final focus for our inquiry—are there any gaps in the present coverage by the law of war of terrorism in armed conflict?

V. GAPS OR AMBIGUITY IN COVERAGE

A. CLAIMS RELATING TO COMBATANTS

Whether there is a gap in coverage, an unregulated situation, or an intended exclusion of terroristic attacks on combatants under prohibitory norms of the law of war, a permissible situation, is hard to say; but it does seem that no complete ban on terrorism practiced against military combatants or military targets when the terror outcome relates to military personnel presently exists. There are, of course, general bans on "unnecessary suffering," the use of poison, assassination, refusals of quarter, the "treacherous" killing or wounding of individuals, among others regardless of the combatant or noncombatant character of the intended target.[71] These sorts of prohibition will regulate terrorism on the battlefield to a certain extent in the sense that some terroristic acts will be prohibited and others will not. Yet, no specific ban on the use of a strategy of terrorism against combatants specifically appears in the prescriptions as it does under customary law in connection with noncombatant targets or under the Geneva Conventions in connection with noncombatants[72] or captured military personnel—prior combatants that become noncombatants due to capture and control.[73]

Again, what is authoritatively interpreted as "treacherous" **or** "unnecessary" will vary with circumstances and the policies to be

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[71] *See, e.g.*, **N.C.**IV, art. 23; **FXI** 27-10, paras. 28-34 and 41; and J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, ***supra*** note 5, *passim.*

[72] *See, e.g., G.C.*, arts. 3, 13, 16, 31 and 33; and J. **PICTET,** IV **COMMENTARY** at 31, 40, 220,225-226 and 594.

[73] *See, e.g.*, G.P.W., art. 17 (prohibiting physical and mental torture or "any other form of coercion," etc.).

served. Sometimes the label "treacherous" will coincide with the use of a terroristic strategy and, thus, result in a legal decision of impermissibility. However, where there is a necessary, and not otherwise treacherous, terrifying attack on counter military groups, combatants, the conduct may well be permissible in most cases. Notably lacking are prescriptions governing terror or even fear inducing combat tactics utilized against combatants. The 1949 Geneva Convention on prisoners of war does not attach until the relevant person has "fallen into the power of the enemy'' (article 4), in the case of an international armed conflict, or is a person "taking no active part in the hostilities," in the case of an armed conflict not of an international character, (common article 3). The same applies for "combatants" covered under the Geneva Wounded and Sick Convention.

History is far too replete with examples of the use of terror tactics against one's combatant enemies to support a claim that law prohibits such conduct entirely or that armies are willing to give up such a strategy in the context of armed conflict. We have referred to the remarks of von Clausewitz that favored the use of terror against civilians for effective control,[74] and one can imagine the lack of restraint which must have then existed upon the use of terror against combatants. In a recent article, Colonel Neale has stated that "[m]ilitary terror differs from civil terror whose ultimate end is control, while the first aims for the phvsical and moral destruction of the enemy's armed forces."[75] Ne rather unhesitatingly accepts it as "a legitimate instrument of national policy";[76] and adds that it has been extensively utilized in warfare. To document this statement he lists events such as the Nazi V-1 rocket attacks on English cities, the Allied terror-bombing of Dresden, events such as Hiroshima, Rotterdam, Coventry—all events apparently to place pressure upon the enemy military elites or overall capacity in much the same way the Germans attempted in World War I to do so for area control—and also states:

> Various modern warfare techniques are as terror-inducing as Hannibal's elephants were intended to be: unrestricted submarine warfare by Germany in the First World War, the initial use of tanks, napalm and poison gas.[77]

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74 See *supra* note 21.

75 Col. W. Neale, "Oldest Weapon in the Arsenal—Terror," Army, hug. 1973, at 11, 13.

76 *Id. at* 11. "Legitimacy" here'seems to be concluded more from extensive use and effectiveness than from any analysis of actual perspectives.

77 ***Id.*** at 13-14.

Terrifying weapons probably have been used throughout history for a terror impact in addition to normal military use,[78] just as the ancients played upon psychological predispositions when they utilized new weapons, tactics or means of dress and deception. A 17th Century Dutch jurist (Zouche) posed the question whether "the superstition of enemies may be used to their hurt?," and apparently added the following passage to mark his approval:

> Philip, King of Macedon, crowned with laurel his soldiers when they were about to fight against the Phocians, because the Phocians had despoiled the temple of Apollo, and so would be terrified at the sight of that god's own leaf. The device succeeded, for they at once turned their backs, were cut down, and gave the King a bloodless victory . . . Gentilis says there is no reason why advantage should not be taken of the superstition of enemies. . .[79]

Ever since the time of the ancients, the practice of instilling panic in the enemy so that his forces can be cut down has persisted, and no legal distinction exists between the killing of the fighting or the fleeing soldier unless in a specific context it would be rather easy to capture him. But another 17th Century Dutch jurist Grotius, sought to draw a distinction between those still fighting and the captured with the following passage on the killing of those who are captured or willing to surrender:

> Exceptions, by no means just, to these precepts of equity and natural justice are often alleged:—Retaliation:—the necessity of striking terror:—the obstinacy of resistance. It is easily seen that these are insufficient arguments. There is no danger from captives or persons willing to surrender; and therefore, to justify putting them to death, there should be antecedent crime, of a capital amount. . .[80]

By the 18th and 19th Centuries, the distinction by Grotius was fairly well accepted, although one text writer, while criticizing an earlier practice, actually raised a claim that would be seen again as he stated:

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[78] One is reminded of the earlier use of the cross-bow, arbalist, harquebus, musket and poison gas, and their subsequent condemnation. See, *e.g.*, MAINE, INTERNATIONAL LAW 138-140 (2 ed. 1894); and C. FENWICK, INTERNATIONAL LAW 667 (1965).

[79] R. ZOUCHE, AN EXPOSITION OF FECIAL LAW AND PROCEDURE, OR OF THE LAW BETWEEN NATIONS, AND QUESTIONS CONCERNING THE SAME 175-176 (Holland 1650; C.E.I.P. ed., J. Brierly trans. 1911).

[80] III. H. GROTIUS, DE JURE BELLI ET PACIS 222-223 (W. Whewell trans. 1853). See also J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility, supra* note 5 at 129, and authorities cited.

> In ancient times an invading army, to inspire terror, sought the earliest opportunity of displaying its severity. The slaughter of those who held out was vindicated on the ground that destroying one garrison without mercy might prevent others from resisting, and so save the effusion of blood.[81]

Today, Che Guevara has written of the use of terror against "point men," the lead elements of a military unit on the move:

> It is very important as a psychological factor that the man in the vanguard will die without escape in every battle, because this produces within the enemy army a growing consciousness of this danger, until the moment arrives when nobody wants to be in the vanguard.[82]

Moreover, in stressing the psychological impact of a guerrilla ambush but blurring the distinction made by Grotius and present norms he writes:

> After causing panic by this surprise, he should launch himself into the fight implacably . . . Striking like a tornado, destroying all, giving no quarter unless tactical circumstances call for it, judging those who must be judged, sowing panic among the enemy combatants. . .[83]

Also of recent import has been the practice of armies in combat in utilizing strategies aimed at inducing psychological states of fear, anxiety and terror by such methods as: using silencers on weapons for night sniping, using night barrages of fire or intermittent firing for such purposes, calling out to enemy encampments at night, using loudspeakers at night to threaten or play upon enemy superstitions such as fear of death—death moans, using intermittent silent periods between attacks upon enemy positions, using boobytraps—or any material or weapon—for such purposes, mutilating the dead or dying—strictly prohibited by customary law and Geneva law—torturing detainees for information or any other purpose—strictly prohibited by Geneva law—attacking all scouts or troop outposts—or any particular location or functionary—for such a purpose, playing

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[81] J. MACQUEEN, CHIEF POINTS IN THE LAWS OF WAR ASD NEUTRALITY 1-2 (London 1862). This claim of the ancients is close to a claim of military "necessity" and seems to have been followed by Clausewitz, many of the WW I and WW II German military officers if not as well by Allied air commanders, and U.S. General Sherman in a somewhat different style. See ***supra*** notes **20-22;** and E. STOWELL, H. MUNRO, INTERNATIONAL CASES 172-173 (1916).

[82] CHE GUEVARA, GUERRILLA WARFARE 65 (J. Morray trans. 1969). See also *id.* at 10-11, 16-19, 85, 93-94.

[83] *Id.* at 36. Included in his "judging" of those "who must be judged" are claims for summary execution and assassination with terror outcomes of military advantage. See ***id.*** at 16, 18-19, ***29,*** 85 and 93-94. Of course, summary executions, assassinations and "giving no quarter" are strictly prohibited by the law of war.

"cat and mouse" with an enemy unit readily subject to capture or quick annihilation, spreading false rumors of disease or other calamitous events in order to force a panic or surrender, threatening to summarily execute captured enemy personnel or armed "resisters" and sabatours—something that would be strictly prohibited by Geneva law—threatening other types of reprisals against persons protected by the Geneva Conventions—something that would be equally prohibited—including threatening to maltreat captured relatives or friends or "sympathizers" of enemy personnel or causes, and uses of massive fire power against enemy combatants for such purposes. Terrifying a combatant through conduct which is otherwise prohibited presents no problem for legal decision—it remains prohibited. Terrifying by threatening to do something which would be prohibited if the threat were carried out should be viewed as impermissible, as is the case under general efforts to prohibit threats and attempts under a general Convention on terrorism, since the policies behind the specific prohibitions would seem better served by such an approach; but there have been no actual cases or legal principles of such a specific character known to the author outside of the argument here. The remaining question—is everything else directed at combatants to be permissible or are there cases where the serving of goal values requires some restrictions on the use of terror against combatants by other combatants?[84] Only the community can provide the ultimate answer, but perhaps a proper deference to the principles of "necessity," "proportionality," "unnecessary suffering," and humane treatment will leave little else for regulation except where a specific consensus develops concerning the proscription of a specific type of strategy.

B. CLAIMS RELATING TO NONCOMBATANTS

Another area for policy consideration involves the use of terror tactics against noncombatants which are not in the actual control of the precipitator armed force.[85] As mentioned before, the customary law had developed principles prohibiting; the attack, by any means, upon noncombatants per se, but intervening practice of aerial

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[84] Note that attacks upon combatants by those without a recognizable uniform or insignia is already prohibited under the law of war. ***See, e.g.***, J. Paust, ***My Lai and Vietnam: Norms, Myths and Leader Responsibility, supra*** note 5 at 131-135 and 141, and references cited; and ***supra*** note ***70.***

[85] Of course, attacks upon noncombatants that are already in the actual control of the attacking military force (detaining power) is specifically prohibited in all contexts.

warfare left a gap in the prohibition in the context of a total war.[86] Much of the prior expectation has since been recaptured and efforts are underway to specify this prohibition in greater detail in the new Geneva Protocols being formulated, but it would seem that the community cannot be too repetitive in articulating its perspectives on this matter if it wants to guarantee an expectation that no noncombatants can ever be the intended object of a terroristic attack. Presently, during an international armed conflict, Article 4 of the Geneva Civilian Convention generally precludes from the coverage of Article 33, which prohibits all forms of terrorism, those persons who are not "in the hands of" a capturing power.[87] Articles 13 and 16, however, are much wider in coverage since they apply to the whole of the populations of the parties to the conflict; but for a terroristic strategy to be specificallv prohibited there, it would seem to have to involve certain types of participants therein mentioned as either instrumental or primary targets: (1) those "exposed to grave danger," (2) wounded, (3) sick, (4) infirm, (5) expectant mothers, (6) shipwrecked, (7) children under the age of fifteen who are orphans or who have been separated from their families as a result of the war, and (8) members of a hospital staff protected under Article 20 or medical units.[88] In the case of a conflict not of an international character, common Article 3 of the Geneva law undoubtedly prohibits any terroristic attacks upon any noncombatants, captured or not,[89] but even here a specific prohibition such as the one contained in a new ICRC Draft Protocol would seem helpful.''

The next area for consideration involves the problem of "incidental" or "unintended" and unforeseeable terror. This problem can arise where an attack upon a combatant group would otherwise be deemed permissible, but the situation for consideration involves the close proximity of noncombatant personnel to legitimate military targets or combat operations. Generally, it can be stated, the presence of civilians in close proximity to a military target does not render the area immune from aerial or ground attack and unintentional suffering resultant from the proportionate engagement of that

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86 *See* E. Stowell, *supra* note 34; and J. Paust, *The Nuclear Decision in World War 11—Truman's Ending and Avoidance* of War, 8 INT'L LAWYER 160 (1974).

87 *See* J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility, supra* note 5 at 148.

88 *See* J. Paust, *Legal Aspects of the My Lai Incident, supra* note 34 at 145-149.

89 *See* J. PICTET, IV COMMENTARY at 31 and 40.

90 See also U.N. Doc. A/A.C.160/1/Add. 1 at 4 (reply of Canada).

target is not a violation of the law of war.[91] This is usually categorized as "incidental" terrorism or suffering, but is all "incidental" terror among noncombatants, which is something that to a certain extent seems to occur in all armed conflicts, to be totally banned, freely allowed or to be analyzed by community decision makers in terms of actual context and the impact upon shared goal values?

Sir Lauterpacht, in commenting on the gap in the complete legal proscription of the attacks upon noncombatants which occurred during World War II, had stated that civilians *per* se must never be targets and that "indiscriminate" attacks were outlawed, but that in the context of World War II there may have been a distinction between these impermissible acts and the bombing of "civilian centers" for imperative military objectives "in an age of total warfare." He also made a distinction between the peremptory prohibition of "intentional terrorization—or destruction—of the civilian population as an avowed or obvious object of attack" and induced terror which is "incidental to lawful operations."[92] Close to this claimed distinction, and with a different interpretation of what is "incidental" that is more akin to von Clausewitz, Guevara and Soviet ideology, is a remark from the early Spanish jurist Suarez that:

> . . . innocent persons as such may in nowise be slain, even if the punishment inflicted upon their state would, otherwise, be deemed inadequate; but incidentally they may be slain when such an act is necessary in order to secure victory . . . the case in question involves both public authority and a just cause.[93]

What is merely "incidental" to lawful military operations is a key question which should be approached with a comprehensive map of policy and context. Otherwise the community will be drawing fine conclusionary lines between attacks on populations *per se* and population "centers," or between "intentional" terror

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[91] *See, e.g.*, G.C., art. **28;** J. PICTET, **IV** COMMENTARY at 208-209; FM **27-10,** paras. 40-42; H. DeSaussure, *The Laws of Air Wmfare: Are There Any?*, **23** NAVAL WAR COLLEGE REV. 35, 40-41 (1971); T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 141 (1970); and J. Paust, *My Lai and Vietnam: **Norms,** Myths and Leader Responsibility, supra* note **5** at 150.

[92] *See* H. Lauterpacht, *The Problem of the Revision of the **Law** of War, supra* note **26** at 365-369.

[93] See also T. BATY, J. MORGAN, WAR: ITS CONDUCT AND LEGAL RESULTS **176** (London 1915), *citing* the German jurist Holtzendorff for a claim that the *levy en masse* should be granted pw protective status upon capture "unless the Terrorism so often necessary in war does not demand the contrary."

and foreseeable "incidental" terror, in a manner unresponsive to all community values. It is assumed that Professor McDougal and others would approach the question this way, but it is not clear whether they would now ban outright the "incidental" population terror utilized to coerce state political elites (or is such ever merely "incidental" to a military objective when utilized as an essential component of the process?)[94] Today, even if the community outlaws all attacks on population "centers" (we still seem to be hostages in a nuclear balance), this question of "incidental" terror in armed conflict seems unavoidable.

Additionally, this type of distinction, as stated before, points to the need for a greater clarification by the community of the goal values it wishes to protect in this and related contexts, and to the need for a more useful set of decisional criteria than the mere conflicting conclusions of intended "object of attack" or "incidental" terror. Words that have appeared in recent debates and studies on the general question of international terrorism such as "innocent" or "indiscriminate" seem to evince a groping for a similar legal distinction between direct attacks upon noncombatants, attacks upon combatants and indiscriminate uses of armed violence. The use of the word "innocent" in reference to targeting or needed protection has permeated recent governmental statements on the general question of international terrorism." It is not clear at all, however, whether states had actually intended to hinge the question of permissibility on such a nebulous concept and its implied opposite: "guilty," with its potential for a greatly divergent moral, political and other ideological content as well as summary decisional procedures, generally of a simplistic nature. Most likely, the word has merely been repeated from the use made in the Secretary General's Report on Terrorism, Such a copying is dangerous unless the community is changing its perspectives on the above matters. The word "innocent," again, is fraught with human rights problems connected with the prohibition under the law of war of summary executions and related prohibitions under general human rights law of the denial of a fair trial.[96]

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[94] *See* McDOUGAL, FELICIANO at 657-658; but *compare* ***id.*** at 80 n.195 and 660 **n.** 421 *with id.* at 668.

[95] The use of the word "innocent" appears in some 39 of the 55 replies made to the Secretary General by August 1973 or contained in the ***Ad Hoc*** Committee Report of September 1973.

[96] For relevant legal norms see, *e.g.*, ***G.C.***, arts. 3, 5, 22, 33, 71 and 147; G.P.W., arts. 13, 82-108 and 130; FM 27-10, paras. 28, **31**, 78 and 85; and United States v.

A much less extensive use of the word "indiscriminate" appears in the general debate and no clear consensus as to its criterial value appears,[97] but it is at least a word of some use and with an historic underpinning in the type of decisional distinction made in connection with discriminate attacks upon combatants and attacks made with little or no effort to distinguish between combatants and noncombatants or between permissible and impermissible targets. If we consider the normative content of the law of war and tie in words such as "object of attack," "incidental," and "indiscriminate," we at least have some identifiable goal values and criteria for arriving at a more rational and comprehensive decision in cases involving terror outcomes and effects outside of the intended arena of interaction or outside of the permissible targets, especially if we include in such a consideration the general principles of proportionality, humane treatment and unnecessary suffering including the requirements of protection and respect for persons protected by Geneva law. Most likely, the use of phrases such as states and persons "not directly involved" in the conflict, persons "unconnected with—or not responsible for—the basic cause of the grievance," and "third states" is connected with an attempt to make a criterial distinction of a similar nature (and not just a self-protective apathy).[98] It is most difficult, however, to relate the use of such phrases in the early comments of states on the general problem of international terrorism to some implied geographic, "guilt," or involvement criterial distinction in connection with terroristic prohibitions under the law of war. Most of the comments are short

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List, 11 T.W.C. at 1253 and 1270. See also J. Paust, *My Lai and Vietnam: Norm, Myths and Leader Responsibility, supra* note 5 at 138-139 on the potential for human disaster and massacres inherent in the use of such ambiguous criterial references as "innocent."

97 The use of the word "indiscriminate" appears in some 7 of the 55 replies made to the Secretary General. See U.N. **Doc.** A/A.C.160/1 and Adds 1-5. Included here are: Federal Republic of Germany, France, Israel, Italy, Norway, Romania and South Africa.

98 See *id.* Included are: Austria (particularly countries which have nothing to do with the conflict), Barbados (third States), Belgium (Third states having no connection with the state of war), Canada, Czechoslovakia ("unconcerned" persons re: political or other motives), Federal Republic of Germany ("not involved" in the conflicts), Iran (persons "unconnected with—or not responsible for—the basic cause of the grievance"), Ireland, Italy (particularly persons with "no link" and arenas "beyond areas of tension"), Netherlands (concentrate on those "not parties" to a conflict), Norway (aoncentrate on acts against third state), Yugoslavia (acts "outside the areas of belligerence").

and vague, perhaps intentionally so, and do riot seem to consider the law of war.

VI. CONCLUSION

It can be stated that in future efforts by states to articulate an authoritative distinction between permissible and impermissible terror of an international nature, some effort will have to be made to consider the existent norms and expectations articulated under the law of war and the general law of human rights. Already the law of war prohibits terroristic attacks directed at noncombatants, but there are several questions which seem to require greater attention and a more detailed set of decisional criteria for a more rational and policy-serving community effort. Some of these questions involve the distinctions to be drawn in the case of terroristic attacks upon combatants, criteria1 distinctions in connection with the problem of "incidental" or "unintended" terror, and the general question of definitions and broad exclusions.

Broad exclusions from the legal regulation of conduct in certain contexts such as self-determination struggles, struggles against aggressors, workers struggles or guerrilla warfare would be extremely unwise and contrary to general trends and expectations which relate to the development of a more inclusive referrent to authority, a more interdependent and cooperative world community, and the quest for human dignity and a minimizing of armed violence. Mankind simply cannot afford to leave whole areas of the most violent of confrontations outside of the regulation of law and the broad demand for human dignity.

PROOF OF THE DEFENDANT'S CHARACTER*

Lieutenant Colonel Richard R. Boller**

> The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add.[1]

I. INTRODUCTION

Judge Hand's statement must be the result of the sense of frustration one encounters in attempting to reconcile the myriad of conflicting rules that govern the presentation of character evidence. In no other area of the law of evidence are questions of basic relevancy faced more frequently than they are when dealing with character evidence. This is true because character evidence, as it is most frequently employed, is circumstantial in nature and requires the fact finder to draw certain inferences and arrive at conclusions based on those inferences.

Confusion results from the interuse of the terms *character* and *reputation.* The two are not synonomous: character is what the man is; reputation is what he is thought to be. Thus, it is conceivable that a man of poor character may enjoy a splendid reputation and the converse might also be true.

Many of the current rules which govern the admissibility of character evidence were in use in the early 18th century. These rules are not always based upon logical or relevant considerations, but are sometimes the result of extrinsic factors. The most relevant types of character evidence are frequently incapable of use because they are *too* probative[2] and the old maxim "actions speak louder than words," though still logically valid, is not followed when proving character. An accused's past acts whether good or

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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1 Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Judge Learned Hand referring to character evidence).

2 See *generally*, Faulknor, *Extrinsic Policy Affecting Admissibility*, 10 RUTGERS L. REV. 574, 584 (1956).

bad, are generally inadmissible to establish his character.[3] Special rules attend the area of the expression of character through opinion that are not followed in the field of opinion evidence generally; hearsay and rumor, the scourge of the law of evidence, may frequently be relied upon when a witness testifies to the reputation of another.[4] As in many other areas of the law, these rules may no longer be compatible with the lifestyle of the majority of Americans. For example, the continued viability of reputation as evidence of character should be questioned since most Americans live in large and impersonal metropolitan areas rather than small villages where everyone knows his neighbors. Likewise, these rules have not kept pace with scientific advances, especially in the field of psychiatry.[5] The precise nature of a man's character is difficult to ascertain and yet a considerable body of law is based upon the assumption that the individual's character is stable and basically unchanging from year to year.[6] This article will not involve itself with those situations in which character is "in issue," that is where character is an essential element of a charge, claim or defense, but will attempt to provide some meaningful guidance for those instances where proof of the defendant's character may affect the outcome of a case. Among the areas to be covered by this article are: the importance of character evidence to the military practitioner; the methods and means available to elicit character evidence; how to prove the accused's character; how the prosecution may rebut evidence of the accused's good character; limitation of character witnesses; and instructional requirements.

II. THE IMPORTANCE OF CHARACTER EVIDENCE

A. *GENERAL*

The principal virtue of character evidence is its utility. In the vast majority of cases it is possible to find *someone* who has some-

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3 *See* Rule 404(b), PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES (1972); Michelson v. United States, 335 U.S. 469. 491 (1948).

4 Michelson v. United States, 335 U.S. 469 (1948). It is not what the witness knows but what he has heard that is germane to reputation.

5 *See, e.g.*, United States v. Hodges, 14 U.S.C.M.A. 23, 33 C.M.R. 235 (1963) (the Court of Alilitary Appeals was reluctant to accept an expert evaluation of character but allowed the expert to testify in a traditional lay capacity.).

6 Disraeli's comment is apropos "Characters do not change. Opinions alter, but characters are only developed." In this same light, one should also consider Gurney's cryptic assessment: "A tree will not only lie as it falls, but it will fall as

thing good to say about the defendant. Character evidence is reasonably easy to adduce and there are varied means of presenting it. It is admissible in any case whether felony or misdemeanor or whether the defendant has pled guilty or not guilty. Evidence of good character tends to humanize the criminal defendant and thus enables fact finders and sentencing agencies to treat the defendant as an individual since they know something about him.

In any system of justice which engages in extensive plea bargaining, the presentation of the defendant's character in the most favorable light is probably the defense counsel's most important duty. In the military system less than half of the cases tried will involve the question of guilt or innocence.[7] Indeed, the system operates much like the civilian criminal process. Most criminal trials are by and large adversary only in the sentencing phase.

B. PRETRIAL STAGES

The best way for a criminal defense lawyer to win a case is to never have to try it. Military pretrial procedure governing the disposition of charges lends itself to the dismissal or modification of charges at the initial stages of a prosecution.[8] It is good practice for a defense counsel to give a commander reasons to deal leniently with a defendant at the earliest possible stage of a case. The time spent getting statements from character witnesses at this stage of the proceeding will reward the defendant and his counsel many times over and even if the case is referred for trial, the affidavits or statements will then be admissible in evidence.[9]

A pretrial investigation under Article 32, Uniform Code of Military Justice," provides a useful forum in which the accused's counsel may present character evidence favorable to the defendant.[11] The advantages of presenting character evidence at this hearing are numerous: the rules of evidence are not strictly followed and a

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it leans." If this were true, the whole theory of rehabilitating a bad man would necessarily be in disrepute.

[7] FISCAL YEAR 1973 ANALYSIS OF GENERAL COURTS-MARTIAL AND SPECIAL COURTS-MARTIAL DATA. (Records Control and Analysis Branch, Office of The Judge Advocate General-Army).

[8] *See, e.g.*, United States v. Werthman, 5 U.S.C.M.A. 440, 18 C.M.R. 64 (1955); United States v. Lawson, 16 U.S.C.M.A. 260, 36 C.M.R. 416 (1966).

[9] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 146*c* [hereinafter referred to as MCM or MANUAL].

[10] 10 U.S.C. § 832 (1970).

[11] United States v. Kirkland, 25 C.M.R. 797 (AFBR 1957).

more meaningful presentation may be made by the witness;" the proceeding is generally *ex parte* and the witness will not be subjected to extensive cross-examination; the same evidence that has an effect upon a commander generally affects the Investigating Officer and might produce a favorable recommendation as to disposition of the case; and character testimony at this stage may influence the Staff Judge Advocate to recommend disposition, and the convening authority to dispose, of the case by means other than by court-martial.[13]

The availability of character witnesses to testify for the defendant may also improve his leverage in bargaining for a favorable pretrial agreement by not requiring the government to subpoena defense character witnesses. Article 46, UCMJ provides that:

> The trial counsel, the defense counsel and the court-martial shall have equal opportunity to obtain witnesses . . . in accordance with such regulations as the President **may** prescribe.[14]

Paragraph 115, Manual for Courts-Martial,[15] sets forth the procedures to be followed by counsel requesting a witness. In *Washington v. Texas*,[16] the United States Supreme Court announced that the sixth amendment provision requiring compulsory process for obtaining witnesses in the defendant's favor was applicable to state prosecutions under the due process clause of fourteenth amendment. The Court of Military Appeals has done at least as much for military defendants by holding that the testimony of character witnesses may be necessary to the ends of justice in a particular case and furthermore that the defendant is entitled to present the witness personally before the court-martial.[17] Although this subject will be treated in more depth later in this article, the point to be made is that the defendant may gain favorable treatment from

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[12] MacDonald v. Hodson, 19 U.S.C.M.A. 582, 42 C.M.R. 181 (1970).

[13] United States v. Eller, 20 U.S.C.M.A. 401, 43 C.M.R. 241 (1971); United States v. Boatner, 20 U.S.C.M.A. 376, 43 C.1I.R. 216 (1971). The convening authority must be properly advised by his Staff Judge Advocate in the pretrial advice in accordance with Article 31, UNIFORM CODE OF MILITARY JUSTICE [hereinafter referred to as UCMJ or CODE].

[14] 10 U.S.C. § 846 (1970) (Article 46, UCMJ).

[15] MCM, para. 115.

[16] 388 U.S. 14 (1967).

[17] United States v. Sears, 20 U.S.C.M.A. 380, 43 C.M.R. 220 (1971). United States v. Sweeney, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964).

the government by offering to present character evidence by deposition, stipulation or letter.[18]

C. AT THE TRIAL

Juries tend to reward the good man and to penalize the bad man; this human inclination has produced the prohibition against the introduction of acts of uncharged misconduct to show that the defendant is, or was, a bad man. Writers from James Gould Cozzens to Kalven and Zeisel have recognized that the jury is definitely influenced by evidence of good character.[19] Judges are also influenced by whether an accused is a "bad man," and in many cases where the jury acquits, the judge would have convicted him because he knew of the defendant's criminal record. Kalven and Zeisel devote a full chapter to a discussion of the reasons for judge-jury disagreement about a verdict.[20] It makes sense to assume that judges and juries will be influenced favorably by the defendant who exhibits good character. If counsel can give the fact finder, either judge or jury, good character upon which to hang his hat, his client will benefit as a result.

Furthermore, the military jury is instructed that evidence of the accused's good character, ***standing*** *alone* "may be sufficient to raise a reasonable doubt that [he] committed the offense charged." [21] The jury instructions in many other criminal justice systems inform the jury that character evidence, considered with the other evidence in the case, may be sufficient to raise a reasonable doubt.[22]

D. DEFERMENT OF CONFINEMENT

Article 57(d), UCMJ, provides that an accused who has been sentenced to confinement may request the convening authority to defer his confinement until his sentence is ordered executed. Evidence of good character of the defendant in the record may influ-

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[18] *Cf.* **United States v. Cummings, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968) (For the government to offer a favorable pretrial agreement in exchange for a defendant's waiver of his rights has been condemned).**

[19] **See,** *e.g.*, COZZENS, THE JUST AND THE UNJUST 57 (1942); KALVEN & ZEISEL, THE AMERICAN JURY 242-54 (1966).

[20] **Kalven & Zeisel,** ***supra*** **note 19, at ch. 8.**

[21] **United States v. Pond, 17 U.S.C.M.A. 219, 38 C.M.R. 17 (1967); United States v. Sweeney, 14 U.S.C.M.A. 599, 604, 34 C.M.R. 379, 384;** U.S. DEP'T OF ARMY, PAMPHLET NO. 27-9, MILITARY JUDGE'S GUIDE, **para. 9-20 (1969).**

[22] ***See,*** *e.g.*, ILLINOIS PATTERN FOR JURY INSTRUCTIONS § **3.16 (1968).**

ence the convening authority to defer confinement. Although the Article speaks in terms of the deferment being within the "sole discretion" of the officer to whom the request is made, the Court of Military Appeals has held that the action is subject to review at both the granting stage[23] and the rescinding stage.[24]

E. INITIAL AND APPELLATE REVIEW

Both the convening authority and the Court of hlilitary Review are empowered to review trials *de novo*.[25] They are required to base their approval of the findings on the reasonable doubt standard[26] and at both of these stages of review defense character evidence can raise a reasonable doubt as to the guilt of the accused and thus have an effect upon the findings themselves.?'

Although findings of guilty are approved, sentencing considerations are important to most defendants. The convening authority has absolute discretion to disapprove or modify a sentence so long as he does not increase the severity of the sentence.[28] To assist the convening authority in determining an appropriate sentence, the staff judge advocate is charged with the responsibilitv of advising him as to the specific action that should be taken in each case.[29] A failure on the part of the staff judge advocate to accurately summarize evidence of the defendant's good character may constitute prejudicial error."

Sentencing considerations play a major role in the work of the Court of Military Review. For the past two years the court, although affirming the findings, has modified sentences in nearlv 20 percent of the cases reviewed.[31] It is axiomatic that a defendant

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[23] Dale v. United States, 19 U.S.C.M.A. 254, 41 C.M.R. 254 (1970) (assuming reviewability on the question of abuse of discretion).

[24] Collier v. United States, 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970).

[25] *See* 10 U.S.C. §§ 864 and 866*c* (1970) (Articles 64 and 66*c*, UCMJ).

[26] MCM, paras. 86b(1)(c) and 100*a*.

[27] *See, e.g.*, United States v. Enlow, 46 C.M.R. 518 (NCMR 1972); United States v. Simpson, 26 C.M.R. 553 (ABR 1958).

[28] MCM, para. 88*a*.

[29] See 10 U.S.C. § 861 (1970) (Article 61, UCMJ) and MCM, para. 85*b*.

[30] United States v. Arnold, 21 U.S.C.M.A. 151, 44 C.M.R. 205 (1972); United States v. Hubbard, 21 U.S.C.M.A. 131, 44 C.M.R. 185 (1971); United States v. Blackwell, 12 U.S.C.M.A. 20, 30 C.M.R. 20 (1960).

[31] ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATE GENERAL OF ARMED FORCES, JANUARY 1, 1970 TO DECEMBER 31, 1970, at 18 and Analysis of General and Special (BCD) Court-Martial Data (FY 1971, Office of The Judge Advocate General-Army).

who has evinced good character stands a better chance of having his sentence ameliorated.

III. NATURE AND UTILITY OF CHARACTER EVIDENCE

A. NATURE

There are two types of character evidence: direct and circumstantial. Direct evidence of character is often referred to as "character in issue." Although this article does not deal with direct evidence of character, it must be referred to briefly in order to highlight its circumstantial use and to allow the reader to distinguish it from circumstantial character evidence. In a libel or slander action, the plaintiff pleads that his character was defamed by the slanderous language used by the defendant. The defendant in his reply admits the language, but claims the words spoken about the plaintiff were true. To the extent that those allegations reflect upon the plaintiff's character, they may be proved.[32] Similarly character of the victim is in issue in a seduction case where a statute requires her to have been 'of previously chaste character." Her previous acts of intercourse with others are therefore admissible.[33]

Those who deprecate the value of character evidence do so on two bases. First, reputation is not an accurate barometer of character. Objectivity may be difficult when the witnesses are friends, acquaintances, or relatives of the defendant. Second, the probative value of the inference "good men do not commit crimes" is thought by many to be too tenuous to justify the expenditure of the court's time.[34] Undoubtedly, some of the most publicized crimes involve those who have fallen from high places. One in a position of trust probably had a good reputation or he would not have been in that position; his abuse of that trust simply means that other factors such as opportunity or present situation outweighed his desire to sustain his good reputation. Business, family and social relationships are to a great extent based upon one's ability to predict another man's response to a given situation. When it is said that "his action was unexpected" or "he acted out of character,"

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32 Talmadge v. Baker, 22 Wis. 625 (1868).

33 Burrow v. State, 166 Ark. 138, 265 S.W. 642 (1924).

34 *See* McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 185 (2d ed. 1972). Consumption of inordinate time is one factor. Others are undue arousal of the jury's emotions, distraction, and unfair surprise.

it means the assessment was in error. It does not mean, however, that the inference is of no value; it simply means that the inference is not infallible.[35] Character evidence meets the test for circumstantial evidence: if the evidence offered renders the desired inference more probable than it would be without the evidence, it is relevant and generally admissible.[36] Many decisions involving investment, medicine, and the peno-correctional process are based upon profiles created on the basis of past action or inaction.[37]

1. Chnracter before Findings. Evidence of a defendant's good character is relevant in a criminal prosecution.[38] It may be helpful to place the various inferences involved in a logical format:

1. The defendant enjoys a good reputation;
2. Persons enjoying good reputations probably possess good character;
3. Persons of good character probably would not commit the act charged; therefore
4. The defendant probably did not commit the act charged.

First, the syllogism can be abbreviated by combining factors 1 and 2; that is, the defendant has a good character. This however overlooks the fact that man's real character can rarely be ascertained. The only indicia of his character are the things he has done, what the community thinks his character is, and what specific persons who enjoy an acquaintance with him believe his character to be. In summary, he may perform benevolent acts, enjoy an excellent reputation, and be rotten to the core. What he really is and what he is thought to be may be quite different.[39]

When considering factor 3 one should not ignore the fact that persons of good character may commit a criminal act. The fact that they usually do not do so, or probably do not do so, only makes it improbable, not impossible, for the defendant to have committed the act. Logically, the nature of the particular act the defendant is charged with committing should have some bearing upon any inference that may be drawn. For instance, a man of good character probably would not commit murder, but might

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35 See Michelson v. United States, 335 U.S. 465, 490 (1948).

36 *See* United States v. Flesher, 37 C.M.R. 669 (ABR 1967); McCORMICK, *supra* note 34, at § 185.

37 See generally, GLUECK, PREDICTING DELINQUENCY AND CRIME (1559).

38 Edginton v. United States, 164 U.S. 361 (1896).

39 *See* J. WIGMORE, EVIDENCE § 52 (3d ed 1940).

run a red light, and although it was once thought that evidence of good character could be presented only in capital cases, Wigmore has stated that evidence of good character is admissible for the defendant in any case whether misdemeanor or felony, *malum in se* or *malum prohibitun.*[40] It is, however, accurate to state that character evidence is *more* probative in a case where the conduct attributed to the defendant is a gross deviation from the normal or one where a specific state of mind is required.

The Court of Military Appeals and the Courts of Military Review have, on numerous ocdasions, commented upon the value of character evidence. Evidence of the defendant's good character is thought to be particularly beneficial in sex cases.[41] These cases usually involve close questions of fact, where character evidence will be of greater value.[42] Sex cases oft-times pit the credibility of the victim[43] against the good character and morality of the defendant, and consequently lend more weight to any character evidence presented.

2. *Character after Findings.* The nature of character evidence introduced in the post-findings stage of the case is different than that elicited on the merits. Prior to findings character evidence tends to show that the accused did not commit the act, or if he did, that it was not done with the requisite criminal intent. During the post-findings stage of the trial, character is introduced to mitigate punishment or *to* show a potential for rehabilitation. In military criminal practice many of the restrictions which are placed upon the introduction of character evidence on the merits disappear in the post-findings stage. The Manual provides that the rules of evidence are relaxed for the defense in the post-findings stage of the proceeding~.~It explicitly states that specific acts of bravery or good conduct are admissible after findings have been reached,[45] although

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40 *Id.* § 56 and cases cited therein.

41 United States v. Conrad, 15 U.S.C.M.A. 439, 25 C.M.R. 411 (1965); United States v. Blackwell, 12 U.S.C.M.A. 20, 30 C.M.R. 20 (1960).

42 United States v. Schultz, 18 U.S.C.M.A. 133, 39 C.M.R. 133 (1969); United States v. Dodge, 3 U.S.C.M.A. 158, 11 C.M.R. 158 (1953). Character evidence is of no value on findings when accused admits the crime charged in court. See *also* WIGMORE, *supra* note 39, at § 56; Michelson v. United States, 335 US. 469, 490 (1948).

43 *See* MCM, para. 153a for special rules in assessing the credibility of the victim of a sex crime.

44 MCM, para. 75*c*(1).

45 MCM, para 75*c*(4).

both the Manual and the case law dictate a contrary result when such evidence is offered on the merits? The Court of Alilitary Appeals has held that to some extent the rules of evidence also are relaxed for the government at this stage of the trial.[47] Improper references to an accused's character after findings have been reached can usually be cured by reassessing the sentence. When the improper references occur during the trial of the merits of the case, courts are reluctant to assess the damage and will often dismiss charges or order a rehearing.

A cardinal rule followed in criminal trials is that prior to findings it is the defendant who determines whether his character will be litigated.[48] After the findings, the government has the opportunity to litigate the character of the defendant irrespective of what the defense does. As an aid in sentencing, prior convictions,[49] service records,[50] and records of punishment under Article 15, UCMJ, are admissible.[51] Although an extensive treatment of the subject is beyond the scope of this article, counsel should be aware that personnel records maintained in accordance with service regulations[52] which reflect the past conduct and performance of the accused are admissible.[53]

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[46] United States **v.** Haimson, 5 U.S.C.M.A. 208, 17 C.M.R. 208 (1954); United States v. Jacks, 18 C.M.R. 912 (AFBR 1955); MCM, para. 138*f* (refers to opinion and reputation as the means by which character may be evinced).

[47] United States v. Plante, 13 U.S.C.M.A. 266, 32 C.M.R. 266 (1962); United States v. Blau, 5 U.S.C.M.A. 232, 17 C.M.R. 232 (1954). *But* see United States v. James, 34 C.M.R. 503 (ABR 1963) where the introduction of hearsay evidence was not permitted; United States v. Anderson, 8 U.S.C.M.A. 603, 25 C.M.R. 107 (1958) where the court held that the defendant still has a right of confrontation.

[48] With reference to cross-examination of defense character witnesses the Supreme Court has noted "[i]n cases such as the one before us, the **law** foreclosed this whole confounding line of inquiry, unless defendant thought the net advantage from opening it up would be with him." Michelson v. United States, 335 U.S. 469, 485 (1918).

[49] MCM, para, 75*b*(2). The term "convictions" refers to convictions by court-martial. Convictions in federal or state courts are *not* admissible under this section but may be admitted under para. 75d of the Manual.

[50] MCM, para. 75*d*; Army Reg. No. 27-10, para. 2-20 (26 Nov. 1968) [hereinafter referred to as AR 27-10]; United States v. hlontgomery, 20 U.S.C.M.A. 35, 42 C.lI.R. 227 (1970).

[51] XR 27-10, para. 2-20b(2); United States v. Cohan, 20 U.S.C.M.A. 169, 43 C.M.R. 309 (1971); United States **v.** Turner, 21 U.S.C.M.A. 356, 45 C.1I.R. 130 (1972); United States v. Gouing, 45 C.M.R. 749 (ACMR 1972).

[52] Army Reg. No. 640-2 (30 June 1972) governs the content and maintenance of the Enlisted Qualification Record (DA Form 20).

[53] United States v. Montgomery, 20 U.S.C.M.A. 35, 42 C.lI.R. 227 (1970);

B. UTILITY

There is considerable authority supporting the proposition that character evidence is of a greater utility and probative value in the military than in the civilian community. Although there are cases which tend to denigrate the value of character evidence in civil cases even where fraud or bad faith is in issue[54] as well as in serious criminal cases,[55] character evidence in military trials is given a preferred position. Dean Wigmore, instrumental in formulating the evidentiary rules in the 1928 Manual for Courts-Martial, approached the problem from the point of view of the admissibility of an honorable discharge certificate. In his view, the soldier is constantly observed and subjected to controls which the average civilian never faces and the discharge is a testimonial to the soldier's successful completion of this rigorous period of observation by his superiors, a stamp of approval on his general good character.[56]

Colonel William Winthrop, in his compendium of military law, treated character evidence as something apart from evidence generally:

> So much a matter of course is the admissibility of evidence of good character on a military trial, that, where the same exists, the accused should be allowed all reasonable facilities for obtaining it; where it cannot be procured without too considerable a delay or other embarrassment to the service, the fact of its existence and its substance will in general properly be formally admitted of record, by the prosecution.[57]

At the time Winthrop wrote, all types of character evidence, including acts of good conduct, bravery, efficiency, fidelity, subordination, temperance, courage, or any traits or habits that make a good officer or soldier, were apparently admissible on the merits

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United States v. Taylor, 20 U.S.C.M.A. 93, 42 C.M.R. 285 (1970). Notwithstanding the relaxed evidentiary posture of court-martial proceedings subsequent to findings, the limits of relevancy may be exceeded if prior misconduct too remote in time is introduced. See, *e.g.*, Rule 609b, PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (1972).

[54] Mutual Life Ins. Co. v. Kelley, 49 Ohio App. 319, 197 N.E. 235 (1934) ". . . the introduction of such evidence in civil cases to bolster the character of the parties and the witnesses who have not been impeached, would make trials intolerably tedious and greatly increase the expense and delay of litigation."

[55] Commonwealth v. Becker, 326 Pa. 105, 191 A.351 (1937). Murder—testimony of good reputation is of doubtful value and often deceptive. See ***also*** WIGMORE, ***supra*** note 39, at § 55 and cases cited therein,

[56] *See generally,* WIGMORE, ***supra*** note 39, at § 59; United States v. Browning, 1 U.S.C.M.A. 599, 5 C.M.R. 27 (1952).

[57] WINTHROP, MILITARY LAW AND PRECEDENTS 352 (2d ed. **1920).**

of the case even though the plea was one of not guilty.[58] To some extent these *liberal rules* inure today to the benefit of the military accused. The reasons for the liberality are twofold. First, unlike the civilian community, the military establishment is inission oriented. Although justice is an essential ingredient of morale, and thus affects the ultimate mission, a commander may decide, based upon his needs and the expected contribution of the particular accused, that he should disapprove the findings and sentence and allow the accused to continue to perform his part of the overall mission. In order to permit the commander to effectively weigh the benefits of the accused's continued service, the record of trial should reflect the accused's abilities and accomplishments. Second, unlike the civilian defendant who is usually tried in the geographic area in which he resides, the military accused may be tried on another continent, thousands of miles from people who know him and could testify as to his character. This factor prompted the drafters of the 1951 Manual for Courts-Martial to incorporate liberal evidentiary rules in eliciting proof of character.[59]

IV. METHODS OF PROVING CHARACTER

Logically a man's character may be evinced in three ways: (1) specific acts of good or bad conduct may be shown, *(2)* the opinion of people who know him may be admitted, and (3) his reputation in the community in which he resides may be shown.

A. SPECIFIC ACTS

A man's past conduct is probably the best indication of his present character; however, the rules of evidence preclude this type of proof[60] and there is no movement currently advocating an evidentiary rule reform which would allow the introduction of specific acts to establish good or bad character.[61]

Extrinsic policies, not relevancy considerations, dictate this evidentiary rule—the evidence is *too* relevant.[62] Three reasons are generally given for excluding such evidence: (1) a defendant may

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58 *Id.* at 351.

59 See LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, 1951, comment on MCM, para. 146*b* at 233.

60 WIGMORE, ***supra*** note 39, at § 53.

61 *See* Rule 404(b), REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (1972).

62 WIGMORE, supra note 39, at § 193.

be hard pressed to rebut acts of misconduct which may span his lifetime, (2) the jury will have a tendency to convict based upon the prior misconduct and not on the evidence relating to the offense charged, and (3) the major issues at the trial are likely to become clouded.[63]

In apposition, it is just as relevant to show that the defendant lacks a disposition to commit a particular crime by proof of laudatory acts. Historically, at least until the late Eighteenth Century, prior acts of good conduct were routinely admitted in English trials; the English practice would allow a character witness to give his *opinion* of the defendant's character. It is logical to assume that the specific acts of good conduct were admitted to show the basis for the witness' opinion, but with the demise of the opinion character rule in England, prior benevolent or gracious acts were held inadmissible.[64]

Today, a majority of the civilian courts hold that evidence of the defendant's past good acts is inadmissible to show his good character.[65] In a murder case in which self-defense is an issue, there would be no error committed by excluding particular transactions which tended to prove a quiet and peaceable disposition on the part of the accused. The rule in the military is similar[66] but because the witness may express his opinion of the character of the person about whom he testifies, a greater liberality should be accorded that witness regarding the recitation of specific acts of good, or bad, conduct:

> The general rule is that specific prior acts may not come in to show the good character of the defendant, Concededly this rule should be much less rigidly applied in military law administration than elsewhere, in view of the reception of opinion testimony of good character. And a [military judge] should not be criticized for adopting a liberal view concerning the sort of evidence which may be utilized to evince good character.[67]

What is left is a general rule which precludes the introduction of specific acts to prove character. The Court of Military Appeals, in precatory language, has advised trial judges to be liberal in allowing the defense character witness to state the basis for his opinion of the accused's good character. The basis may consist of prior

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63 *Id.* § 194.

64 See generally, WIGMORE, supra note 39, at § 195.

65 People v. Van Gaasbeck, 189 N.Y. 408, 82 N.E. 718 (1907).

66 United States v. Jacks, 18 C.M.R. 912 (AFBR 1955).

67 United States v. Haimson, 5 U.S.C.M.A. 208, 224, 17 C.M.R. 208, 224 (1954).

laudatory acts. The theory is appealing until the government calls witnesses in rebuttal and elicits the specific basis for their conclusion that the accused's character is bad.

It is proper to allow the cross-examiner to test the basis of a witness' opinion and when a rebuttal character witness states that the accused's veracity is bad, the defense counsel may ask him the basis for his opinion. When the witness states that the accused has lied to him a half dozen times in as many weeks, the answer is there,'' and although the defense is entitled to an instruction limiting the purpose for which the court members may consider the evidence,'') realistically, no instruction can be of sufficient force to erase the matter from the minds of the jury.''

Several principles which have an effect upon the introduction of specific acts should be noted. One was termed "multiple admissibility" by Wigmore and was explained in these words:

> . . . when an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity.[71]

For example, at trial, a specific relevant act of misconduct may tend to prove motive, intent, plan, design, knowledge, or identity of the perpetrator of the offense being tried. Such act is admissible even though it mav coincidently place the accused in a bad light.'' Similarly, when defense evidence purports to show that an event either did or did not occur, the Government may prove the converse by resort to a specific act.[73] A witness who testifies as to the

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[68] United States v. Turner, 5 U.S.C.M.A. 445, 18 C.M.R. 69 (1955).

[69] United States v. Back, 13 U.S.C.M.A. 568, 33 C.M.R. 100 (1963). The requirement to limit in this instance arises independent of a request, at least in the findings stage of the trial. United States v. Worley, 19 U.S.C.M.A. 444, 42 C.M.R. 46 (1970) (Such evidence may be considered by the court in adjudging an appropriate sentence.).

[70] See Bruton v. United States, 391 U.S. 123 (1968); United States v. Bradwell, 388 F.2d 619, 622 (2d Cir. 1968) (". . . we must indeed confess a degree of skepticism to the reality of expecting all twelve jurors to perform a feat of first raising and then lowering a mental bulkhead altogether beyond our capacity.").

[71] WIGMORE, *supra* note 39, at § 13.

[72] *See, e.g.*, United States v. Luzzi, 18 U.S.C.M.A. 221, 39 C.M.R. 221 (1969); United States v. Kirby, 16 U.S.C.M.A. 517, 37 C.M.R. 137 (1967); MCM, para. 138g.

[73] United States v. Kindler, 14 U.S.C.M.A. 394, 34 C.M.R. 174 (1964) (Prior acts of homosexuality admitted on the merits of the case.); United States v. Hamilton,

accused's good reputation may be cross-examined as to his ever *hearing* of a specific act of misconduct;[74] if his testimony includes his opinion of the accused's character, he may be asked if he *knows* about a specific act of misconduct committed by the accused.[75] The principal purpose for admitting this evidence is to test the *character witness'* credibility, not to show the accused to be a bad man, and the jury must be instructed to limit their consideration of the uncharged act to the purpose for which it was admitted. Specific acts may also be admissible to show that the victim of a violent crime was in fact an aggressor[76] or to show that the victim of a sex crime consented or is an incredible witness.[77]

B. REPUTATION EVIDENCE

The usual contemporary practice is to prove the character of the defendant by the ,use of reputation evidence.[78] Character may be evinced by a showing of a person's reputation in the community and reputation is the concensus of what the community believes an individual's character to be. There is authority for the proposition that the witness testifying as to another's reputation need not know him personally:[79] the witness' testimony is not based on personal knowledge;[80] he is merely a conduit of community belief.

Since reputation evidence is hearsay, it is admitted as an exception to the hearsay rule. The circumstantial probability of the reliability of reputation evidence has been stated by Dean Wigmore:

> . . . where the subject matter is one which all or many members of the community have an opportunity of acquiring information and have also an interest or motive to obtain such knowledge, there is likely to be such

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20 U.S.C.M.A. 91, 42 C.M.R. 283 (1970) (Federal conviction admitted at the post-findings stage of trial on a rebuttal theory).

74 Michelson v. United States, 335 U.S. 469 (1948).

75 United States v. Webster, 23 C.M.R. 492 (ABR 1957); Advisory Committee's Note to Rule 405, PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES (1972).

76 United States v. Desroe, 6 U.S.C.M.A. 681, 21 C.M.R. 3 (1956); MCM, para. 138*f*.

77 *See* MCM, para. 153*b*(2) (b).

78 WIGMORE, supra note 39, at §§ 1981 and 1986; Advisory Committee's Note to Rule 405, PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES (1972).

79 Michelson v. United States, 335 U.S. 469 (1948).

80 United States v. Kahan, 479 F.2d 290 (2d Cir. 1973).

> a constant, active and intelligent discussion and comparison that the resulting opinion, if a definite opinion does result, is likely to be fairly trustworthy.[81]

Several pertinent points must be made about evidence of character evinced by reputation. First, one's reputation is built slowly; it is distinguishable from rumor in that it has been substantiated and most generally will be the result of many acts and occurrences.[82] For this reason, it would be difficult for a transient to develop a reputation.[83] Second, in order to meet the reliability test, the witness must be a member of the same community as the person about whom he testifies.[84] One who merely visits a community is not competent to testify to a member's reputation;[85] he simply has not been a party to the "constant, active . . . discussion and comparison" which is required. Third, the word "community" has been given a liberal interpretation by the courts;[86] the Manual specifically provides that a military unit is a community.[87] Fourth, since bad men are tallied about more than good men, the fact that a reputation witness has heard nothing about the defendant may be evidence of the good reputation of the defendant, and hence good character.[88] Fifth, assuming that character is a relatively stable attribute. one's reputation for honesty ten years before a charged larceny should be as reliable as one's reputation at the time of the alleged offense. Wigmore has stated that the evidential value of the former is "unquestionable," [89] but many courts would find that this evidence is too remote in time to be admissible.[90] Sixth, a false repu-

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[81] WIGMORE, *supra* note 39, at § 1610.

[82] *Id.* §§ 1610-11.

[83] *See*, Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 512-513 (1939).

[84] WIGMORE, *supra* note 39, at § 1615.

[85] MCM, para. 138*f*(1).

[86] United States v. Irwin, 467 F.2d 1132 (1st Cir. 1972). The Court of Military Appeals has held that a church parish could qualify as a community. United States v. Johnson, 3 U.S.C.M.A. 709, 14 C.M.R. 127 (1954).

[87] MCM, para. 138*f*(1). Reputation evidence may be confined to one's place of business or among members of a restricted group. United States v. Oliver, – F.2d – (8th Cir. 1973); Cosler v. Norwood, 97 Cal. App. 2d 665, 218 P.2d 800, 801 (1950). Community also includes the place where a man works, worships, shops. relaxes and lives. United States v. White, 225 F. Supp. 515, 522 (D.D.C. 1963).

[88] Michelson v. United States, 335 U.S. 469, 478 (1948); People v. Van Gaasbeck, 189 N.Y. 408, 82 N.E. 718 (1907); WIGMORE, *supra* note 39, at § 1614.

[89] WIGMORE, *supra* note 39, at § 1617.

[90] Akward v. United States, 352 F.2d 641, 644 (D.C. Cir. 1965); People v. Gonzalez, 58 Cal. Rptr. 361, 426 P.2d 929, 941 (1967).

tation may be formed after the community has developed a partisan attitude based upon the unsubstantiated criminal charge itself.[91] The Army Court of Military Review has employed this principle to condemn rebuttal of good pre-offense character with poor post-offense character.[92] Seventh, because reputation is based upon hearsay and oft-times is something akin to rumor, a witness may be asked whether he has ever heard anyone speak of any acts of misconduct committed by the defendant. The theory seems to be that the reputation witness virtually states "No one speaks ill of him" or "I have never heard anything bad about him," and if the witness has not heard about an act of misconduct of significant proportions, it may be a reflection upon the extent of his knowledge of the accused.[93]

C. THE OPINION OF PEOPLE WHO KNOW HIM

Evidence of one's reputation has been termed mute and colorless[94] and an "irresponsible product of multiplied guesses and gossip" which is intangible and untestable.[95] Conversely, opinion evidence has been described as colorful, warm, natural, straightforward and intimate.[96]

During the Eighteenth Century, it was common practice in the English courts to allow a witness to express his belief or opinion regarding the character of another and to speak of reputation alone was regarded as improper. So liberal was the practice that witnesses were allowed to state that, based upon their knowledge of the defendant, they doubted that he could be capable of committing the offense charged.[97] Wigmore doubted the efficacy of this practice since it invaded the prerogative of the jury.[98] Two cases decided in the Nineteenth Century were the undoing of the opinion rule,[99] and both Wigmore and McCormick have expressed their doubts as to the validity of these decisions.[100]

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91 WIGMORE, *supra* note 39, at § 1618.

92 United States v. Monroe, 39 C.M.R. 479 (ABR 1968).

93 Michelson v. United States, 335 U.S. 469 (1948).

94 MCCORMICK, *supra* note 34, at § 158.

95 WIGMORE, *supra* note 39, at § 1986.

96 *Id.* §§ 1983 and 1986.

97 *Id.* § 1981.

98 Id.

99 Regina v. Jones, 31 How, St. Lr. 310 (1809) "It is reputation; it is not what a person knows" of another which is the subject of character evidence; Regina v. Rowton, 10 Cox Crim. Cas. 25 (1865) (no testimony based upon knowledge but only reputation admitted),

100 WIGMORE, *supra* note 39, at § 1981; MCCORMICK, *supra* note 34, at § 158.

Prior to the promulgation of the 1951 Manual for Courts-Martial, the personal opinion of a witness regarding the character of another was inadmissible in a court-martial proceeding."' Opinion evidence was, however, admissible after findings since the rules of evidence were relaxed at that stage of trial.[102]

In present military practice, a witness may give his opinion of another's character.[103] The foundation for the admissibility of this testimony is established by showing that the witness has an acquaintance or relationship with the defendant of such a nature as to enable him to form a reliable opinion of the defendant's character.[104] That the relationship between the parties was tenuous or of a limited nature affects the weight of the evidence, not its admissibility.[105]

It should be recognized that there are serious problems with opinion evidence. First, if a witness is allowed to testify as to his opinion of the character of the defendant, he cannot logically be prevented from stating the reasons upon which this judgment is based; logically, he should be permitted to state all the specific acts perpetrated by the defendant. Commentators who speak in terms of "affectionate'' testimony seem to view this witness as a defense character witness who has only kind things to say about the accused.[106] If, however, the witness has been called by the prosecution in rebuttal and is permitted to testify as to the specific acts of the defendant which give rise to his poor'opinion of the defendant's character, the result would be far from "affectionate" or "warm." [107] Second, assuming the character witness for the defendant does relate specific acts affecting his judgment, it would be nearly impossible for the prosecution to ascertain whether the specific acts are true or are merely- fabrications. Third, if controverting evidence as to the specific acts narrated by the witness were allowed, confusion of

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101 LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, 1951, comment on MCM, para. 138f at 213; MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1928, para. 124*b*; MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1949, para. 139*b*.

102 *See* WINTHROP, *supra* note 57, at para. 553.

103 United States v. Gagnon, 5 U.S.C.M.A. 619, 18 C.1I.R. 243 (1955); MCM, para. 138*f*.

104 MCM, para. 138*f*(1).

105 United States v. Evans, 36 C.M.R. 735 (ABR 1966).

106 *See, e.g.*, WIGMORE, *supra* note 39, at § 1986; Advisory Committee Note on Rule 405(a), PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (1972); MCCORMICK, *supra* note 34, at § 191.

107 The Court of Military Appeals has held such practice proper after a guilty finding has been adjudged, See United States v. Blau. 5 U.S.C.M.A. 232. 17 C.M.R. 232 (1954).

the issues would result in surprise requests for continuances, and extended trials would result.[108]

To sum up, a character witness may, under the military evidentiary rules and the evidentiary rules promulgated for the trial of federal cases, give his opinion of the character of the defendant, but the proponent of the witness will be unable to elicit on direct examination the basis for that opinion.[109] Thus, the fact finder is deprived of something significant: the reasoning process of the witness. It must be content with knowledge of the witness' status and accept the witness' testimony on faith alone. Even with this limitation, opinion evidence presents a truer picture of the defendant than reputation evidence. First, since the witness who testifies as to his opinion of another must *know* that person, he will be able to testify to many more traits than the witness who gives reputation evidence: traits of devotion, resolution, and precision are not generally discussed by members of the community at large. They are, however, capable of observation and may be articulated at trial by a witness who knows the defendant. Second, there are situations when a witness would not be permitted to testify as to reputation but would be permitted to testify as to his opinion of the character of the defendant. The predicate for the admission of reputation testimony may not be capable of establishment; as indicated earlier, the predicate for opinion testimony is not difficult to establish. Third, allowing opinion testimony to be accepted will permit an expert to state his opinion of the individual's character. The advisory committee's note regarding Rule 105, Rules of Evidence for United States Courts and Magistrates, refers to accepting the "opinion of a psychiatrist based upon examination and testing."[110] Many cases allow the receipt of psychiatric testimony in sex cases that pit the credibility of the victim against the character of the accused.[111]

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[108] *See generally* People v. Van Gaasbeck, 189 N.Y. 408, 82 N.E. 718 (1907).

[109] United States v. Grant, 27 C.M.R. 683 (ABR 1959).

[110] Advisory Committee's note on Rule 105, PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (1972). Expert testimony as to the credibility of a prosecution witness has been accepted in exceptional cases. United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950). The Court of Military Appeals reluctantly affirmed a case wherein the government used psychiatric testimony to bolster one of its witnesses after her credibility had been attacked by the defendant. United States v. Hodges, 14 U.S.C.M.A. 23, 33 C.M.R. 235 (1964).

[111] See, *e.g.*, People v. Jones, 42 Cal.2d 219, 266 P.2d 38 (1954); People v. Neely, 228 Cal. App. 2d 16, 39 Cal. Rptr. 251 (1964); People v. Russell, 70 Cal. Rptr. 210, 443 P.2d 794 (1968); United States v. Stone, 24 C.M.R. 454 (ABR 1957). *But* see United States v. Adkins, 5 U.S.C.M.A. 492, 18 C.M.R. 116 (1955). Generally, a

Fourth, the opinion witness need not be a member of the defendant's community. If his association with the defendant is personal as opposed to communal, many of the "have you heard" type inquiries which are designed to test the reputation witness' credibilitv may bc eliminated.[112]

V. GENERAL AND SPECIFIC TRAITS OF CHARACTER

A. GENERAL GOOD CHARACTER

Most courts reject evidence of general good character in criminal cases,[113] and the drafters of the Rules of Evidence for Federal District Courts and Magistrates confined proof of character to a specific trait.[114] The Manual for Courts-Martial provides that ". . . the accused may introduce evidence of his own good character . . . and evidence of his general character as a moral, well-conducted person and law-abiding citizen." [115]

Evidence of general good character is not as relevant as evidence of a specific character trait; there are simply too many factors that make up general good charactzr and most of them probablv will not be relevant to the offense charged. Limiting a witness' testimony to a particular relevant trait requires testimonial precision; it will require a stronger association between the witness and the defendant about whom he testifies.

Several factors, however, justify the receipt in a court-martial proceeding of evidence of general good character. First, due to the nature of military service, many associations are of a short or limited duration. Thus, it is necessary to allow character witnesses to express their conception of character "in a nutshell." [116] Second, many military offenses are not *malum in* se but are *malum pro-*

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trial judge is allowed considerable discretion in handling evidence of this type. United States v. Barnard, -- F.2d -- (9th Cir. 1973); United States v. Amaral, -- F.2d -- (9th Cir. 1973).

112 MCM, para. 138*f*(2) would allow rebuttal of opinion evidence with reputation evidence. In this situation, the prosecution could call a witness to testify to the accused's reputation. This is still not as inflammatory as allowing cross-examination of the defense witness regarding rumors and unsubstantiated offenses.

113 See McCORMICK, *supra* note 33, at § 191.

114 *See* Rule 404, PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (1972).

115 MCM, para. 138*f*(2). See also United States v. Browning, 1 U.S.C.M.A. 599, 5 C.M.R. 27 (1952).

116 United States v. Robbins, 16 U.S.C.M.A. 474, 37 C.M.R. 94 (1966) ("I would not object to serving with him again.").

hibitum; in a case where an offense requires no real mens rea, the argument to admit evidence of general good character is stronger.[117] Third, there are certain military offenses such as desertion in which evidence of prior good military service is particularly compelling.[118] Fourth, there are certain manifestations of personality which would make it less likely that a person committed an offense; describing a person as law-abiding, upright, scrupulous, unswerving, and honorable would have this effect. Evidence of this type may be effective in showing the general lack of propensity to commit any offense. Finally, evidence of good soldierly character may benefit the military as well as the accused. It must be remembered that a convening authority has the discretion to disapprove findings and sentence and return an accused to duty based solely upon his essentiality to the military mission.

B. SPECIFIC TRAITS

In order for an accused to rely upon a specific trait of character in his defense, that trait must have a reasonable tendency to show that it was unlikely that the accused committed the *specific* offense charged.[119] In regard to a crime of violence, the proposition becomes: the accused is peaceful; the trait of peacefulness is inimical to a crime of violence with which the accused is charged; it is therefore unlikely that the accused committed the crime. It is certainly not impossible for the accused to have committed the offense, but the introduction of this trait makes the desired inference—noncommission, self-defense, or extreme provocation—more probable than it would be without the evidence.[120] A list of character traits under generic type offenses that are deemed relevant from the prosecution and the defense points of view is found at the Appendix. The prosecution should remember that it may only rebut; it may not initiate the inquiry into defendant's character prior to findings.[121]

The offenses, traits, and application thereof set forth in the Appendix are neither exhaustive nor unerring and should be used with

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117 *See, e.g.,* State v. Quinn, 344 Mo. 1072, 130 S.W.2d 511 (1939).

118 United States v. Miller, 10 C.M.R. 409 (ABR 1953); United States v. Scott, 10 C.M.R. 498 (ABR 1953).

119 MCM, para. 138f(2).

120 See McCORMICK, ***supra*** note 34, at § 185.

121 United States v. Sellers, 12 U.S.C.M.A. 262, 30 C.M.R. 262 (1961); United States v. Woodley, 12 U.S.C.M.A. 123, 30 C.M.R. 123 (1961); United States v. Pernell, 30 C.M.R. 766 (AFBR 1960).

caution. If the accused is charged with premeditated murder, his defense counsel will not aid his client's cause by eliciting evidence that the defendant is meditative or reflective.

VI. MEANS OF PROVING CHARACTER

A. TESTIMONY OF CHARACTER WITNESS

The testimony of the character witness may be presented in person, by deposition, or by stipulation. The preferred means of presenting the evidence is by a witness' personal recitation of the defendant's character. A leading trial manual suggests the reason:

> The limited information that character witnesses are permitted to convey to the jury in their oral delivery suggests the crucial importance of their ability to communicate on other levels. The real significance of the character witness, in cases where he does any good, is probably far less what he says than how he says it. He is a presence standing up for the defendant. He is not permitted to say this, but he can **look** it. Character witnesses must be expressive. They, more than other witnesses, must be sympathetic to the jury. Prestige is desirable, but it must be coupled with likeableness.[122]

The right of a criminal defendant to present his side of a case is of constitutional dimensions.[123] Both the Uniform Code of Military Justice and the Manual for Courts-Martial contain provisions that relate to the subpoena of defense witnesses[124] and the defense has a right to the personal appearance and testimony of essential defense witnesses.[125] Because of the nature of military life, many potential character witnesses are located thousands of miles from the place of the accused's trial. It was for this reason that the drafters of the Manual formulated liberal rules regarding the obtaining of character evidence. For instance, an accused may prove his good character with affidavits, other writings, discharges, by opinion testimony, and, after findings, by specific acts.[126]

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[122] Section 405, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES (American Law Institute, 1971).

[123] Washington v. Texas, 388 U.S. 14 (1967).

[124] *See* 10 U.S.C. § 846 (1970) (Art. 46, UCMJ); MCM, para. 115 (The decision is made on an individual basis ". . . weighing the materiality of the testimony and its relevance to the guilt or innocence of the accused, together with the relative responsibilities of the parties concerned, against the equities of the situation.").

[125] United States v. Thornton, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957) (An essential defense witness is one whose testimony "goes to the core of the accused's defense."),

[126] See MCM, paras. 75*c*(4), 138*f*, and 146*b*.

Several considerations govern any determination as to the essentiality of the character witness' personal appearance. These considerations are not easily isolated because it is difficult in some cases to determine whether the witness' physical presence was necessary or whether the convening authority's or trial judge's denial of a request for a witness was arbitrary.[127] They are:

(1) If the case is a close one, the need for character witnesses is greater. Cases which are largely circumstantial may devolve into a swearing contest between the accused and a single prosecution witness or a number of prosecution witnesses with doubtful credibility.[128]

(2) The requirement for the personal testimony of the witness is not as great in the post-findings stage of the trial,[129] but when the testimony bears upon the question of guilt or innocence, the appellate courts will be much more willing to find an abuse of discretion.

(3) Courts are more likely to find an abuse of discretion when the requested witnesses are not located a great distance from the site of trial. The refusal to grant a brief continuance when the witness was located on the same installation[130] or when the requested witness would be physically present in the area where the trial was taking place in a matter of days[131] has been held to be an abuse of discretion.

(4) To the extent that a witness' testimony would be cumulative, a denial of a request for his physical presence is proper.[132]

(5) The nature, extent, and temporal proximity of the witness' association with the defendant are factors. Although an opinion witness need not know the defendant intimately in order to qualify as a character witness,[133] this does not mean that every qualified witness must be called. Refusal to subpoena a witness when the

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127 *See, e.g.*, United States v. Sears, 20 U.S.C.M.A. 380, 43 C.M.R. 220 (1971); United Statcs v. Foreman, 18 U.S.C.M.A. 249, 39 C.M.R. 249 (1969).

128 *See, e.g.*, United States v. Sweeney, 14 U.S.C.M.A. 598, 34 C.M.R. 379 (1964); United States v. Thornton, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957). In cases involving unnatural sexual acts, good character testimony is particularly important. United States v. Blackwell, 12 U.S.C.M.A. 20, 30 C.M.R. 20 (1960).

129 United States v. Manos, 17 U.S.C.M.A. 10, 37 C.M.R. 274 (1967); United States v. Sweeney, 14 U.S.C.M.A. 598, 34 C.M.R. 379 (1964).

130 United States v. Foreman, 18 U.S.C.M.A. 249, 39 C.M.R. 249 (1969).

131 United States v. Daniels, 11 U.S.C.M.A. 52, 28 C.M.R. 276 (1959).

132 United States v. Sears, 20 U.S.C.M.A. 380, 43 C.M.R. 220 (1971) (Judge's denial of a request for one witness was proper based upon the cumulative nature of the testimony and remoteness in time.).

133 United States v. Evans, 36 C.M.R. 735 (ABR 1966).

relationship is stale or of a tenuous nature is not an abuse of discretion.[134]

(6) Evidence of a specific trait of character is generally more probative than evidence of general good character as a law-abiding citizen.[135] Although specific traits are generally admitted on the issue of guilt or innocence, their added relevancy will require closer scrutiny.

(7) The availability of other character evidence must be considered. The defendant who has been recently assigned to his present unit and who has not had time to establish his character in the new unit is an example. The trial judge in this case should give additional consideration to any request for defense character witnesses.[136]

(8) If the appellate courts are convinced that the government acted arbitrarily in denying a defense request for a witness, reversal or sentence reassessment is likely to follow. This is considered an extrinsic factor and is not necessarily related to the probative value of the testimony.[137]

(9) The actions of the defendant are a proper consideration. A request that is timely and not submitted for the sole purpose of delaying the trial should receive more consideration.[138] The defendant's compliance with the provisions of the hlanual regarding requests for witnesses is another factor to consider.[139] Finallv, requests which are patently unreasonahle may be denied.[140]

(10) The defense's stipulation to the testimony of a character witness will not preclude appellate relief when the witness should have been produced.[141]

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134 Xwkard v. United States, 352 F.2d 641 (D.C. Cir. 1965).

135 *See* McCORMICK, *supra* note 34, at § 191 and cases cited therein.

136 *See, e.g.*, United States v. llanos, 17 U.S.C.M.A. 10, 37 C.M.R. 274 (1967).

137 See United States v. Sears, 20 U.S.C.M.A. 380, 43 C.M.R. 220 (1971); United States v. Foreman, 18 U.S.C.M.A. 219, 39 C.M.R. 219 (1969).

138 *Cf.* United States v. Jordan, 22 U.S.C.M.A. 164, 46 C.M.R. 161 (1973). *See also* United States v. llanos, 17 U.S.C.M.A. 10, 37 C.M.R. 271 (1967).

139 United States v. Llanos, 17 U.S.C.M.A. 10, 37 C.M.R. 274 (1967).

140 United States v. Zindeveld, 316 F.2d 873 (7th Cir. 1963) (no abuse of discretion for a trial judge to deny requests for 420 witnesses).

141 United States v. Foreman, 18 U.S.C.M.A. 249, 39 C.M.R. 249 (1969) (sentencing), United States v. Sweeney, 14 U.S.C.M.A. 598, 34 C.M.R. 379 (1964) (findings),

B. *DOCUMENTS*

1. Efficiency reports. Efficiency reports for both officer and enlisted accused[142] have been received in evidence since pre-code days,[143] and the present Manual specifically provides that efficiency reports are admissible.[144] The Officer Efficiency Report lists several traits and although it is difficult to see how some of the traits meet relevancy requirements, they are admissible under the Manual provision as tending to show the defendant's "military record and standing . . ." [145] Assuming that the defense introduces the entire report, thus placing in issue something he was not required to, the prosecution should be allowed to rebut that matter.[146]

Although an accused's efficiency report is admissible in his behalf, it is questionable whether it may be admitted against him on the merits of the case.[147] The Manual does not mention its introduction by the government, probably because it is the accused who initially determines whether his character will be litigated. The Manual does, however, provide that the government may rebut evidence of the accused's good character. The prosecution is limited by the "scope of evidence" presented by the defense but not the method of presentation.[148] The Manual does not, however, address the question of whether the testimony of a character witness may be rebutted with an official record. If the record is "official," it will be independently admissible unless the Manual is read so as to restrict the prosecution from offering the document. *What may keep* the document from being admissible as an official record, how-

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142 Based upon the wording of the Manual, there is no way to use a witness' efficiency report to impeach him or to rehabilitate him. See MCM, paras. 138*f*(2) and 153*b*.

143 United States v. Barnhill, 13 U.S.C.M.A. 647, 33 C.M.R. 179 (1963). In *Barnhill*, the Court of Military Appeals implied that the entire efficiency report is admissible.

144 MCM, para. 138*f*(2) (Reports must be authenticated).

145 MCM, para. 138*f*(2). The Court of Military Appeals has held that merely because an official record authorizes a particular entry, the requirements of materiality, competency and relevancy are not abrogated. United States v. Schaible, 11 U.S.C.M.A. 107, 110, 28 C.M.R. 331, 334 (1960).

146 United States v. Sellers, 12 **U.S.C.M.A.** 262, 30 C.M.R. 262 (1961); Walder v. United States, 347 U.S. 62 (1954).

147 In the sentencing stage of the trial different rules apply. See MCM, para. 75*d*.

148 MCM, para. 138*f*(2). The Manual gives examples of rebutting ***reputation*** evidence with *opinion* evidence and vice versa.

ever, is the opinion rule. Official records are admitted "only insofar as they relate to a *fact* or *event*," [149] and to the extent that the efficiency report contains facts,[150] these facts should be admitted. Those portions that contain opinions, however, may be properly excluded.

Two additional factors militate against the use of opinions contained in official records in rebuttal of evidence of good character. First, the need to cross-examine the officer rendering the opinion is critical in this area; these evaluations are subjective matters and any bias or prejudice should be vented before the fact finder. Secondly, paragraph 146b of the Manual supports a defense argument that before the prosecution can rebut with a writing, a defendant must have offered his good character through the use of the writing. When the defendant resorts to affidavits and other writings to prove good character, thus precluding the government from confrontation, he cannot be heard to complain when the government does likewise.[151] When the defendant produces evidence of his good character in this manner, the government may rebut with evidence of similar quality.

2. *Affidavits and other writings.* Although they deprive the prosecution of the opportunity to confront the defense character witness and are in violation of the hearsay rule, affidavits and other writings are admissible on behalf of the 'defendant in military practice.'" The documents are admissible on the merits of the case and there appears to be no requirement that the writings be authenticated.[153] As in the case of writings generally, the matters contained therein must be relevant and competent,[154] and the hearsay rule may be invoked to exclude those matters that do not relate to the defendant's character.[155]

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149 MCM, para. 144*d*.

150 MCM, para. 144*b*.

151 The Sixth Amendment to the United States Constitution does not invest the government with the right to confront defense witnesses.

152 MCM, para. 146*b*.

153 United States v. Moore, 33 C.M.R. 868 (AFBR 1963), *petition denied*, 14 U.S.C.M.A. 679, 33 C.M.R. 436 (1963). There are no modifiers before the word "writings," such as are contained in paragraph 137 of the Manual, *i.e.*, "apparent authenticity and reliability."

154 United States v. Schaible, 11 U.S.C.M.A. 107, 110, 28 C.M.R. 331, 334 (1960); MCM, para. 146*b*.

155 United States v. Moore, 33 C.R.I.R. 868 (AFBR 1963). *petition denied*, 14 U.S.C.M.A. 679, 33 C.M.R. 436 (1963).

Because the Manual treats affidavits and other writings similarly, there should be no prohibition against rebutting defense affidavits with a prosecution writing. If the defendant presents evidence of his character in this manner, the prosecution may rebut with similar evidence.[156]

3. Discharges. An honorable discharge from the service has been characterized by Wigmore in the following language:

> A certificate of *honorable* discharge from the United States Army or Navy, assuming it to be admissible by exception to the hearsay rule . . . , should be liberally construed, *i.e.* as importing not merely general good character, or the specific traits mentioned, but any other of the fundamental moral traits that may be relevant in criminal cases. The soldier is in an environment where all weaknesses or excesses have an opportunity to betray themselves. He is carefully observed by his superiors,—more carefully than falls to the lot of any member of the ordinary civil community; and all his delinquencies and merits are recorded systematically from time to time on his "service record," which follows him throughout his army career and serves as the basis for the terms of his final discharge. The certificate of discharge, therefore, is virtually a summary of his entire service conduct, both as a man and as a soldier. When it is "honorable" in its import, it implies a career successfully negativing all of the more common traits involved in criminal charges. In this respect it is therefore more comprehensive than the ordinary community-repute . . . to general good character, and is entitled to be used on behalf of an accused on virtually any specific charge of serious crime. In view of the high moral value attached to an honorable discharge in the military community, and of the vast numbers of men who saw service in the World-War, it is fitting that the evidential import of such certificates should be liberally recognized.[157]

Decisions of civilian criminal courts have lent credence to this proposition. In *French v. United States*,[158] the trial court admitted the fact that the accused had an honorable discharge which he received eight years prior to the crime but the same court refused to admit the defendant's entire service record containing numerous citations on the basis that it would be improper to prove character by specific acts of good conduct. Likewise, the Court of Military Appeals has held that a prior honorable discharge is admissible on the merits in a court-martial proceeding.[159]

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156 MCM, para. 146*b*.

157 See WIGMORE, supra note 39, at § 59.

158 232 F.2d 736 (5th Cir. 1956).

159 United States v. Harrell, 9 U.S.C.M.A. 279, 26 C.M.R. 59 (1958); United States v. Gagnon, 5 U.S.C.M.A. 619, 18 C.M.R. 243 (1955).

VII. LIMITATION OF CHARACTER WITNESSES

The trial judge has the discretion to limit the number of character witnesses that testify in a case. Arbitrary limitation *may*, however, constitute an abuse of discretion and *may* result in reversal on appeal. Thus, an arbitrary limitation upon the number of witnesses based upon the nature of the offense charged is not possible. Many of the considerations that affect whether a witness *must* personally appear before the court are also relevant to limitations on the number of witnesses.[160] Appellate courts have found abuse of discretion in cases where fixed rules limit the number of witnesses[161] and when a trial judge, as a condition to adjournment, requires counsel to state the number and names of witnesses and later refuses to hear the testimony of a witness not named.[162]

The number and variety of character witnesses may be of the utmost importance to the defendant. The defendant who presents two witnesses who testify to his good character a year before the criminal act may argue that the defendant's character was good a year before the criminal act and it was therefore good at the time of the act.[163] However, the defendant who calls numerous witnesses who have associated with him over an extended period of time and in a variety of situations may justifiably assert that his character was not merely good at the time of the offense but has been good for an extended period of time in a variety of circumstances. Under the latter factual situation, the concept of goodness or of a specific character trait may rise to the level of a life-style. Character and habit are first cousins, but the latter is the richer relative[164] and of greater evidentiary value. Habit is more specific than character; McCormick says that "Character may be thought of as the sum of one's habits though doubtless it is more than this." [165] Habit also has more meaning to a juror; what juror has not thought of himself as a slave to a habit or that a particular action has become second nature to him?

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160 *See* notes 122-141 *supra* and accompanying text. Whether the prosecution has challenged the defendant's character, Carr v. State, 208 So.2d 886 (Miss. 1968), or whether the witnesses were the subject of extensive cross-examination. State v. Demaree, 362 S.W.2d 500 (Mo. 1962), may be material.

161 Cape v. State, 23 Okla. Crim. 161, 213 P. 753 (1923).

162 Campbell v. Campbell, 30 R.I. 63, 73 A. 354 (1909).

163 *See* WIGMORE, *supra* note 39, at § 59.

164 *See generally* McCORMICK, *supra* note 34, at § 195.

165 McCORMICK, *supra* note 34, at § 195.

VIII. ATTACKING THE CHARACTER OF THE ACCUSED

There are three principal methods that the prosecution may use to attack the good character of an accused: (1) impeachment of the character witness, (2) cross-examination of defense character witnesses, and (3) rebuttal.

A. IMPEACHMENT

When a witness testifies as to the defendant's character, he puts his own credibility in issue and is subject to impeachment as is any other witness.[166] In order to diminish his credibility, it may be shown that he has a prior conviction;[167] he may be asked about a prior act of misconduct on his part which bears on moral turpitude;[168] another witness may be called to testify that the character witness has a poor reputation for truthfulness;[169] prior statements inconsistent with his in-court testimony may be offered;[170] or any bias he may harbor in favor of the defendant may be the subject of examination.[171]

B. CROSS-EXAMINATION

1. Opinion Witness. Any witness who testifies as to his opinion of the defendant's character may be cross-examined as to the basis of his knowledge. The extent of his knowledge, his experience generally, and the extent of his association with the accused are valid factors to be probed in this examination. Cross-examination may show that the witness is not a good judge of character; for instance, he may believe that as long as a soldier is productive on duty, the soldier's off-duty conduct is of no concern to the Army; he may feel that every accused is entitled to make several mistakes before he is judged critically; or he may have never been in a position to make job assignments based on character assessment.

A good character witness is one who is observant, discriminating and contemplative. The character witness who testifies that the defendant is of good character must expect to answer the question:

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166 *See generally* MCM, para. 153.

167 MCM, para. 153*b*(2)(b).

168 *Id.*

169 MCM, para. 153*b*(2)(a).

170 MCM, para. 153*b*(2)(c).

171 MCM, para. 153*b*(2)(d).

"Good compared to what?" If he compares the defendant with individuals of questionable character, the defendant may appear mediocre or as one noted writer said "In the valley of the blind the one-eyed man is king." [172] The prosecution can discredit the character witness by showing that the witness has never observed the accused in a situation where his moral fibre was challenged; the mere existence of observation on a day-to-day basis, without challenge and response, is not a particularly sturdy foundation upon which to rest one's opinion of the character of another. The prosecution may show that, as far as the witness is concerned, the accused never had the opportunity to stray from the straight and narrow path. For this reason, testimony from individuals who have observed the defendant only in a confinement situation is of dubious value.[173] It is enigmatic that a fact finder will give less credence to the testimony of the persons who know the accused best and are his personal friends than they will to the testimony of those whose relationship with the accused is impersonal.

Thus, a character witness opines that the accused is peaceful, he may be asked on cross-examination whether he knows that the accused has instigated several recent fights."' A witness who testifies to the accused's honesty may be asked whether he knows of a past conviction for possessing a false pass with intent to deceive."" When a witness testifies that the accused is a good soldier, he may be asked if he knows that the defendant has been reduced in grade.[176]

Whether the testimony of a witness who gives his opinion of the accused's character may effectively be limited to the time that the witness knew the accused has not been decided. It is clear that a witness who testifies as to a defendant's reputation may be asked if he has heard of an unsavory event which took place before the witness knew the accused.[177]

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172 H. G. WELLS, THE VALLEY OF THE BLIND, (Lippincott Ed. 1934).

173 *See* United States v. Williams, 7 C.M.R. 726 (AFBR 1953).

174 United States v. Baldwin, 17 U.S.1I.C.A. 72, 37 C.M.R. *336* (1967).

175 United States v. Webster, *23* C.M.R. 492 (ABR 1957). *petition denied*, 8 U.S.C.M.A. 768, 23 C.M.R. 421 (1957).

176 United States v. Statham, 9 U.S.C.M.A. 200, *25* C.M.R. 462 (1958).

177 Michelson v. United States, *335* U.S. 469 (1948); United States v. Minnifield, 469 F.2d 681 (9th Cir. 1972). To the extent that people tend to base their personal assessments of others not only upon what they *know* but what they hear, the question asked to the opinion witness is proper. It would seem that if the witness is not acquainted with anyone who knows the accused, his lack of ability to have heard anything would preclude inquiry into this area.

The witness who testifies to the accused's reputation does not give his own assessment of the defendant's character but gives the community assessment. The witness who gives his opinion must necessarily base his opinion upon his personal assessment and for this reason, the witness' own standard of what is good character assumes an important role. From the point of view of logical relevancy, the opinion witness may be asked hypothetical questions: "Do you believe that men of good character commit larceny?" or "If you knew the accused had been convicted of larceny, would that change your opinion of his character?"[178] Whether a judge, in the exercise of his sound discretion, should allow this question to be asked on cross-examination of the opinion witness is a different matter.[179] Since the question is hypothetical, there would, theoretically, be no need for the defendant to have been convicted of larceny and therefore no necessity for a preliminary showing of such conviction.[180] Although the Manual provides that hypothetical questions testing the credibility of an expert witness may be asked on cross-examination without regard to facts in evidence,[181] confusion of the issues and the possibility of undue arousal of jury emotions are enough to sustain a defense objection to the inquiry. If the question is allowed, a strong limiting instruction should be required *sua sponte*.

2. *Reputation Witness.* Solomon Michelson was charged with bribing a federal revenue agent and was tried in 1947. The determination of guilt was a close question and turned upon whether the jury believed the agent or the accused. On direct examination, the defendant admitted that he had been convicted of a misdemeanor in 1927; on cross-examination he admitted that in 1932 he had

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178 *See* Kilgore v. United States, 467 F.2d 22 (5th Cir. 1972). The question "if you knew would your opinion be changed?" was held objectionable when the witness testified to the accused's reputation. "Since the whole inquiry is calculated to ascertain the general talk of people about the defendant, rather than the witness' own knowledge of him . . ." Did you know? is not allowed.

179 See McCORMICK, supra note 34 regarding relevancy and its counterweights.

180 See, *e.g.*, Michelson v. United States, 335 **U.S.** 469 (1948); Gross v. United States, 394 F.2d 216 (8th Cir. 1965); Mullins v. United States, – F.2d – (8th Cir. 1973). See *also* ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION STANDARDS § 7.6(d) (Approved Draft 1971).

181 *See* MCM, paras. 138e and 149*b*(1). Confusion of the issues and the possibility of undue arousal of jury emotions are enough to sustain a defense objection to the inquiry. If the question is allowed, a strong limiting instruction should be required ***sua*** sponte.

falsely affirmed that he had never been convicted. Five witnesses testified that Michelson's reputation for honesty, truthfulness and as a law abiding citizen was "very good." Four of the witnesses were asked about the prior conviction; two had heard of it and two had not. Four of the witnesses had known the defendant for fifteen to thirty years; of these witnesses the prosecutor asked. "Did you hear that on October 11th, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods?" None of the witnesses had heard this. The defendant urged that the question was improper but the Supreme Court held otherwise.'"

a. Nature of Testimony. The witness who testifies as to another's reputation bases his testimony upon what he has heard in the community in which he and the defendant are somehow involved;[183] he may not give his own assessment of the person's character.'*' The witness is a mirror of the community's evaluation of the defendant and if this evaluation is not consistent, he should he aware of the inconsistency. The witness' function is to summarize what has been said by others about the defendant even though they may not know very much about him. The reputation witness does not testify as to what the man *is,* but as to the *name* that he has.[185] The witness' characterization or conclusion of community feeling in terms of good or bad "sums up a multitude of trivial details." [186] He is a lay witness who is allowed to give his opinion of community consensus to the jury. Even though they may not hnve affect on his opinion, he is required to disclose current rumors about the defendant since the jury may reject his opinion;'' these rumors may he totally unfounded because we are not dealing with what the person is, but what the community says about him.

b. Analysis of Factors. The cross-examination of the defense reputation witness may be broken into three general areas.

(1) Adverse event. The defendant was involved in an adverse event. Although the trial judge in *Michelson* satisfied himself that *the* event actually occurred, that is, the arrest for receiving stolen

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182 Michelson v. United Statcs, 335 U.S. **469 (1948).**

183 *Id.* at **477** ("such a witness is not allowed to base his testimony on anything but hearsay").

184 *Id.* (An independent opinion of character is not admissible.)

185 ***Id.*** at **478.**

186 ***Id.***

187 ***Id.*** at **479.**

property, the Supreme Court made it reasonably clear that a rumor, without foundation, would suffice. The potential for harm far outweighs the probative value of cross-examination based on rumor since it is possible that the event was blown out of proportion or that the event was misinterpreted. For example, the defendant may not have been arrested but merely taken to the police station for questioning.

(2) Discussion. The witness has stated on direct examination that he has discussed the defendant's reputation in the community and that it is good. If the witness has discussed the defendant's reputation only a few times, he is not qualified to testify about the defendant's character reputation in the community. This fact alone may cause the qualified witness to be characterized as a malicious gossip, a scandalmonger, or a busybody. If the witness states that he began discussing the defendant two years ago, it is proper to ask him about an event which occurred ten years ago, since the event may still be a viable topic of discussion.' If the witness limits his assessment of the defendant's reputation by stating that it is "generally good," the prosecutor may ask the same questions. The questions are a test of the witness' standards of what "generally good" means.

(3) Witness should have heard. If an event worthy of discussion has occurred the witness should have heard it discussed. Such factors as the time of the event and its seriousness should have a bearing on whether it was discussed and whether the witness should have heard it discussed. If he did not hear of the event, assuming it was being discussed, it may be an indication that his "knowledge of the defendant's habitat and surroundings is [not] intimate enough." [188]

c. *Trial Judge Discretion.* The decision in *Mickelson* was based, in large part, upon the discretion reposed in the trial judge.[189] More recent decisions have required a hearing, out of the presence of the jury, at which the judge satisfies himself that the question relates to an actual event.[190] Of equal significance is the requirement that the judge find that the event was likely to provoke discussion within the same time frame about which the witness testifies.

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188 *Id.* at 478.

189 *Id.* at 496. The dissenters would have precluded cross-examination of the defense character witness on specific acts of misconduct.

190 *See* McCORMICK, *supra* note 34, at § 191 and cases cited therein.

d. Summary. The vagaries involved in cross-examination of the character witness in addition to such factors as undue arousal of jury emotion, distraction, and danger of unfair surprise are, it is submitted, good arguments to limit the disproof of good character to evidence in rebuttal.

3. Rebuttal of Defense Evidence. When the defendant has presented evidence of his good character, the government may rebut with testimonial or other evidence that indicates that defendant's character is not good. This procedure is not so damning as the cross-examination of the defense character witnesses for two reasons: (1) the defense may cross-examine the rebuttal witness and *(2)* generally, no specific acts of misconduct or rumors about specific acts of misconduct are admissible. The rebuttal of defense evidence of good character is composed of many variables.

a. Rebuttal of general and specific character traits. In order for a defendant to place a specific character trait in evidence, the trait must be relevant to an element of the offense charged. Proper rebuttal may consist of evidence negativing this specific trait. If the accused presents evidence of his general good character, proper rebuttal consists of an attack on his general good character as well as a specific trait of character relevant to the offense charged.'!'' Consider an accused charged with larceny. The defense may present evidence of his general good character or it may confine its proof to evidence of honesty. Should the defense decide to place evidence of the defendant's general good character before the court, the prosecution may properly rebut with evidence of defendant's poor character generally or with evidence which tends to show that the defendant is dishonest. By placing evidence of general good character before the court, the defendant is saying more than "I am honest." He is saying "I am law-abiding and there are no serious flaws in my character." Logical relevancy would dictate that the prosecution could, in this situation, rebut with evidence of the accused's character for violence; although the trait of violence is not relevant to a larceny prosecution, the accused has made it relevant by opening up the issue.[192] The accused has a two edged argument

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191 *See* MCM, para. 138*f*(2); United States v. Rausch, 43 C.M.R. 912 (AFCMR 1970) (When the accused places his character for peacefulness in issue, it is improper to rebut with evidence of sexual perversion.).

192 See Walder v. United States, 347 U.S. *61* (1954); Michelson v. United States, 335 U.S. 169 (1548). "The cross-examination may take in as much ground as the testimony it is designed to verify." *Id.* at 484. General good character is the sum

to exclude this evidence when the prosecution seeks to rebut in this manner. First, he may argue that the Manual, by setting forth certain methods of rebuttal, has impliedly excluded other methods. Second, extrinsic considerations play an important role in the presentation of general good character and the accused should not be penalized for resorting to such proof.

b. Rebuttal by character at different time ***or*** *place.* Character is reasonably stable and unchanging, As Dean Wigmore wrote: "The person is the same wherever he is, and it is with the person that the trait is concerned." [193] When a defendant has established that his character was good three years before or six months after the alleged crime, it may be inferred that his character was the same at the time of the crime. Generally, the military courts apply more liberal rules than their civilian counterparts regarding the introduction of "remote" character evidence.[194]

Military precedent generally supports the proposition that prosecution rebuttal character evidence need not be limited either to the time or to the place established by the defense evidence. An accused who, during the merits of his case, introduced evidence of good soldierly character for the period 1961-1968 could not be heard to complain when the prosecution, after findings, introduced a federal conviction in 1969 for larceny of government property.[195] Similarly when an accused presents evidence of good character at the time of trial and 10 years before, he cannot complain when the government produces evidence of bad character during the intervening years.[196] The Manual provides that if the accused introduces

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and substance of specific admirable traits. United States v. Kehrer, 41 C.M.R. 892, 898 (AFCMR 1969), *petition denied,* 19 U.S.C.M.A. 599, 41 C.M.R. 403 (1969) (". . . we conclude that good character as to truth and veracity cannot be divorced from good character in more general terms. One who lacks the former can hardly be said to possess the latter. By the same token, there can be no doubt that general good character includes the quality of honesty.").

193 WIGMORE, supra note 39, at § 60.

194 *Compare* MCM, para, 75*c*(4) (any prior discharge admitted to prove character) and United States v. Wake, 32 C.M.R. 536 (ABR 1962), *petition denied,* 13 U.S.C.M.A. 698, 32 C.M.R. 472, *with* Awkard v. United States, 352 F.2d 641 (D.C. Cir. 1965) (three years is too remote) and People v. Gonzalez, 66 Cal.2d 482, 426 P.2d 929, 58 Cal. Rptr. 361 (1967) (seven years is too remote).

195 United States v. Hamilton, 20 U.S.C.M.A. 91, 42 C.M.R. 283 (1970). Civilian criminal courts are split on the question of whether a conviction would have been admissible on the merits of the case. See McCormick, *supra* note 34, at § 191 and cases cited therein.

196 United States v. Wake, 32 C.M.R. 536 (ABR 1962), *petition denied,* 13 U.S.C.M.A. 698, 32 C.M.R. 472.

evidence of good character in the form of an honorable discharge, the prosecution may rebut by showing the character of a discharge for another period of service.[197] Likewise, an accused's prior good character evidenced by honorable discharges may be rebutted by proof that his present character is poor.[198] However, because the defendant's character after the offense has been committed may be affected by the pendency of charges, the prosecution may not employ post-offense character to rebut pre-offense character.[199]

c. Rebuttal with character of a different type. Most judges will preclude the prosecutor from rebutting civilian good character with military bad character or a good combat record with a poor record in garrison.[200] When the defendant introduces broad based evidence of his outstanding soldierly qualities, the prosecution may, however, rebut with evidence of civil misconduct reasonably related in scope and time.[201]

d. Rebuttal when good character not offered as proof of such. When the defense introduces evidence of the defendant's past good service for any purpose, the prosecution should be permitted to rebut by showing that the defendant's service was not as good as the defense evidence indicated. The fact that evidence of good service was introduced to show lack of intent to remain away permanently in a desertion case should not prevent the government from presenting rebuttal evidence. There is, however, authority for the proposition that when a defendant introduces evidence of good military service to negate intent the prosecution may not rebut.[202]

e. Rebuttal with evidence of specific acts of misconduct. The government may not rebut evidence of the accused's good character by proof of specific acts of misconduct. In a homicide case, evi-

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197 MCM, para. 75*c*(4).

198 *See* United States v. Crim, 20 C.M.R. 889 (AFBR 1955).

199 *See* WIGMORE, *supra* note 39, at § 1618 (referring to evidence of reputation); United States v. Monroe, 39 C.M.R. 479 (ABR 1968).

200 United States v. Watts, 24 C.M.R. 384 (ABR 1957). In this situation, the defendant is not saying his character is unblemished but is simply restricting it to a distinguishable portion of his life.

201 United States v. Hamilton, 20 U.S.C.M.A. 91, 42 C.M.R. 283 (1970).

202 United States v. Charlton, 16 C.M.R. 384 (NBR 1954). This case does not represent a sound view of the law. As a matter of a fact, the prosecution's evidence of prior punishments was independently relevant to establish an intent to desert. See, *e.g.*, United States v. Wallace, 19 U.S.C.M.A. 146, 41 C.M.R. 146 (1969).

dence of the defendant's peaceful character may not be rebutted by testimony that he has frequently instigated fights;[203] the prosecutor may, however, cross-examine defense character witnesses with regard to their knowledge of the defendant's fights. Additionally, the prosecution may present evidence of the defendant's violent character. On cross-examination of the prosecution witnesses the defense may ask them the basis for their opinions and it is not error if the witness mentions the individual fights.[204]

If the defense has introduced evidence which tends to show that the defendant has never, or has not within a certain period of time, committed an offense of any kind or of a certain kind, evidence contradicting the defense evidence or its inferences may be introduced in rebuttal.[205] It is the general rule that the matter may not be brought out by the government on cross-examination of the defense witness.[206] When an accused charged with sodomy offered evidence that he is "as normal as anybody else," "not a queer," and that his religious background prevented this type of activity, it was proper for the prosecution to inquire into acts of sodomy 5 and 7 years prior to trial.[207] When an accused charged with drug use presented evidence indicating that he had never used drugs, his uncharged use of drugs at a time prior to trial was admitted.[208]

IX. INSTRUCTIONS

The accused's character may be raised by the testimony of a single witness,[209] whether he be prosecution or defense.[210] When the issue of the accused's character has been raised by the evidence, the court must instruct the jury on the character evidence if requested,[211] and when credibility is manifested by character and the prosecution case is equivocal, and instruction may be required

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203 **United States v. Baldwin, 17 U.S.C.M.A. 72, 37 C.M.R. 336 (1967).**

204 **United States v. Turner, 5 U.S.C.M.A. 445, 18 C.M.R. 69 (1955).**

205 **MCM, paras. 138g and 153*b*(2)(b).**

206 ***See* United States v. Anderson, 13 C.M.R. 829 (AFBR 1953); Boller, *The Revitalization of Walder*, 52 Mil. *L*. Rev. 180 (1971).**

207 **United States v. Kindler, 14 U.S.C.M.A. 394, 34 C.M.R. 174 (1964).**

208 **United States v. Brown, 6 U.S.C.M.A. 237, 19 C.M.R. 363 (1955).**

209 **United States v. Gagnon, 5 U.S.C.M.A. 619, 18 C.M.R. 243 (1955).**

210 ***Id.***

211 **United States v. Schumacher, 2 U.S.C.M.A. 134, 7 C.M.R. 10 (1953); United States v. Mack, 31 C.M.R. 387 (NBR 1961); United States v. Monroe, 39 C.M.R. 479 (ABR 1968).**

sua sponte.[212] Reversal has sometimes followed when the trial judge refused to give a requested instruction,[213] but when character is a minor part of the case,[214] or when the appellate court is convinced that an instruction would not have made any difference,[215] the conviction will be affirmed.

The Court of Military Appeals has rigidly adhered to the position that once the accused has judicially confessed to the crime, character evidence is of no avail.[216] This position is reasonable although it can be argued that the court members are free to disbelieve the judicial confession and still acquit based on the defendant's good character. The introduction of an extra-judicial confession, particularly when it is contested, should not deprive the defendant of any inference his good character may elicit.[217] The nature of character evidence does not tend to establish that an act did not occur, but whether the accused committed it or committed it with the requisite criminal intent.[218]

Although the cases involving instructions have produced fairly consistent results, there are, it is submitted, two aberrations. In *United States v. Harrell*,[219] the defendant was charged with use and possession of marijuana. In attacking the truthfulness of his pretrial confession the accused testified that his confession was the result of his desire for an administrative discharge: he never had used marijuana, The defense also introduced evidence of the defendant's good charater. The trial judge refused to instruct on evidence of good character and the Court of Military Appeals sustained him stating ". . . by depicting his own immorality,. prevarication, and attempted fraud, the accused completely demolished whatever

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212 United States v. Pond, 17 U.S.C.M.A. 219, 38 C.M.R. 17 (1967); United States v. Lell, 16 U.S.C.M.A. 161, 36 C.M.R. 317 (1966).

213 United States v. Cooper, 15 U.S.C.M.A. 322, 35 C.M.R. 294 (1965); United States v. Craddolph, 36 C.M.R. 688 (ABR 1966).

214 United States v. Gladney, 22 C.M.R. 360 (ABR 1966).

215 United States v. Harrell, 9 U.S.C.M.A. 279, 26 C.M.R. 59 (1958).

216 United States v. Dodge, 3 U.S.C.M.A. 58, 11 C.M.R. 158 (1953). See also United States v. Wright, 20 U.S.C.M.A. 12, 42 C.M.R. 204 (1970) and cases cited therein.

217 See United States v. McPhail, 10 U.S.C.M.A. 49, 27 C.M.R. 123 (1958).

218 Id. Notwithstanding a judicial admission of homicide in a murder case, ***good*** character of the defendant is relevant on issues of self-defense, mental responsibility, or guilt of lesser included offenses. *Compare* United States v. Mathis, 17 U.S.C.M.A. 205, 38 C.M.R. 3 (1967) with United States v. Schultz, 18 U.S.C.M.A. 133, 39 C.M.R. 133 (1969).

219 9 U.S.C.M.A. 279, 26 C.M.R. 59 (1958).

effect the evidence of his honorable discharge might otherwise have. When the accused left the stand, there was literally no evidence of good character." [220] In a well-reasoned dissent, Judge Ferguson posited that the trial judge had usurped the jury's function by not giving the instruction: "The weight to be accorded this evidence was exclusively a matter within the court-martial's discretion." [221]

In *United States v. Wright*,[222] the accused was charged with committing indecent acts with a child "with intent to gratify his sexual desires.'' His defense was that his acts were the product of a psychomotor epilepsy induced by compulsive and chronic alcoholism. Evidence of his good character while sober was introduced and the trial judge agreed to instruct on evidence of good character but neglected to do so. The Court of Military Appeals affirmed the findings since there was no serious question as to whether the act occurred. Judge Ferguson's partial dissent is more persuasive. In syllogistic form, his argument may take the following form: (a) the defendant normally possesses good character except when drinking; (b) persons of good character are not likely to assault children with the intent to gratify their sexual desires; (c) the defendant was probably drinking at the time of the act; and (d) his drinking may have negated the required intent.

X. CONCLUSION

Character witnesses should be carefully selected. The witness' manner of presentation, his bearing, and his ability to form an effective rapport are all the more important based upon the limitations placed upon his testimony. The witness should have high standards. **As** a predicate to his testimony these standards, which may be evinced by factors of age, maturity, decorations, troop experience, judgment and responsibilities, should be related. The witness' dress, deportment, and manner of address are a reflection of these standards.

Many military jurors will find the testimony of senior noncommissioned officers more meaningful than that of officers generally. The exposure which the average enlisted accused has to senior officers is limited. His direct supervisors generally know him best.

Spend as much if not more time in preparing the character witness to testify. It is easier to relate a fact than it is to give an opin-

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220 Id. at 282, 26 C.M.R. at 62.

221 Id. at 284, 26 C.M.R. at 64.

222 20 U.S.C.M.A. 12, 42 C.M.R. 204 (1970).

ion and this is particularly true when the opinion is one involving an abstraction such as a personality trait.

In order to utilize character evidence effectively, it is important to know how much evidence adverse to the accused exists. It is quite likely that one witness in rebuttal can effectively negate what three defense witnesses have to say. In most cases it is possible to present carefully limited and structured evidence and preclude rebuttal. If this is not possible, consideration should be given to admitting the infirmity in order to create an aura of candor and honesty.

Whether a character witness will be made available will be influenced by timely requests for him, compliance with procedural requirements, and a reasonable attitude on the part of the proponent of his testimony. Although the witness on the merits may be important on the issue of guilt or innocence, the witness on sentence may recite specific acts of good conduct.

Finally, in military trials the factors of punishment and deterrence are not as important as they are in civilian criminal cases. Of paramount importance is the mission of the unit. If the command's mission would be adversely affected by the loss of the accused, testimony to this effect should be presented.[223] The benefits of a good record extend through the appellate process.

APPENDIX

INFERENCE OF NON-COMMISSION	*INFERENCE OF COMMISSION*
Disrespect & Disobedience	
subservient	assertive
timid	aggressive
weak	spontaneous
cautious	opinionated
indecisive	insolent
limp	disdainful
dedicated	irreverent
	rude
	derisive
Desertion and AWOL	
loyal	indifferent
persevering	indolent

[223] *See* United States v. Robbins, 16 U.S.C.M.A. 74, 37 C.M.R. 94 (1966).

INFERENCE OF NON-COMMISSION	*INFERENCE OF COMMISSION*
steadfast	sluggish
fervent	lazy
devoted	remiss
faithful	disinclined
tireless	lax
	inattentive

False Statements & Perjury

honest	deceptive
dependable	deceiving
candid	elusive
sincere	tricky
frank	conniving
open	crafty
guileless	perfidious

Crimes of Violence

passive	aggressive
timid	audacious
weak	militant
timorous	dominating
reflective	domineering
cautious	venturesome
peaceful	impulsive
meek	assertive
unresisting	rash
resigned	spontaneous
patient	violent
mild	
humble	
calm	

Derelictions

careful	listless
dedicated	lax
attentive	indifferent
industrious	indolent
thorough	careless
enthusiastic	neglectful
loyal	lazy
painstaking	slack

INFERENCE OF NON-COMMISSION	*INFERENCE OF COMMISSION*
methodical	remiss
fervent	loose
precise	
resolute	
ardent	
prompt	
energetic	

Nonconsensual Sex Crimes

chaste	carnal
virtuous	sensual
virginal	lewd
celibate	lustful
pure	prurient
undefiled	lecherous
peaceful	wanton
	bestial
	violent

Larcenies & Misappropriations

honest	deceitful
scrupulous	lying
trustworthy	furtive
honorable	thieving
charitable	larcenous
unselfish	light-fingered
guileless	
generous	
benevolent	

PERSPECTIVE

THE HISTORY OF THE TRIPOD OF JUSTICE*

Justice William H. Erickson**

I. INTRODUCTION

Chief Justice Burger, in coining a now famous metaphor, compared our justice system to a tripod. He said that in order for the wheels of justice in our adversary system to grind true, it was not **only** necessary to have a strong trial judge but also mandatory that the trial judge be assisted in the truth-finding process by a competent and ethical prosecutor and defense lawyer.[1] The concept, of course, recognizes that if anyone of the three entities is weak or fails to render the proper service, the tripod will collapse. Each leg of the tripod must be equally strong if our common-law adversary system is to produce justice as the final product. In short, the prosecutor, the defense lawyer, and the trial judge each has duties and responsibilities which must be met if justice is to be attained.

It is axiomatic that our criminal justice system must not only be fair, but must appear fair to society. Fundamental fairness and verity in the truth-finding process are essential to our system of justice.*

Central to this article are the *Standards for Criminal Justice of the American Bar Association* which have set forth in black-letter precision the manner in which a trial should be conducted, together with the rights, duties and responsibilities of the prosecutor, the defense lawyer, and the trial judge. The Standards represent an intricate, interlocking set of rules which balance advocacy with fundamental fairness and the ethical requirements of the legal pro-

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"This article was adapted from the third Kenneth J. Hodson Criminal Law Lecture at The Judge Advocate General's School on 24 January 1974. The views expressed are those of the author and do not necessarily represent the views of any governmental agency.

**** Associate Justice, Supreme Court of Colorado.**

[1] Address by Chief Justice Warren E. Burger, Second Plenary Session American Bar Association Anual Meeting, July 16, 1971. See also Burger, The Special Skills of Advocacy—Are Specialized Training And Certification of Advocates Essential to Our System of Justice? John F. Sonnett Memorial Lecture, Fordham Law School (Nov. 26, 1973).

[2] *See* Gosa v. Mayden, — U.S. — (1973).

fession. In interpreting the Standards, all seventeen of the Standards must be reviewed together. The Standards, coupled with the Code of Professional Responsibility and the Code of Judicial Conduct, provide an integrated whole which governs the trial of a criminal case.[3]

The Standards seek to cause the search for the truth to be changed from the historic fox-and-hounds approach to a new and enlightened concept for a criminal trial which calls for discovery, simplification of the issues, and a just and speedy trial. The Standards make justice the goal and provide guidance to the prosecutor, the defense lawyer, and the trial judge. A brief review of history establishes the background for Standards which provide (1) counsel for the accused, (2) an independent prosecutor, and (3) a fair and impartial trial judge.

II. THE DEFENSE COUNSEL

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.[4]

The seemingly clear pronouncement in the Sixth Amendment to the United States Constitution which called for ". . . the Assistance of Counsel . . ." has provided intellectual fodder for nearly seven generations of American legal analysts—both military and civilian. Judges, scholars, and lawyers generally have conceded that since 1789 ". . . the right to have Assistance of Counsel . . ." has allowed accused persons in state and federal criminal proceedings to retain their own counsel to assist them in their defense, but the comparable right to be represented by a lawyer before a military tribunal is of only recent development.[5] While the focus of attention relating to the right to counsel in state and federal criminal trials has been placed upon the availability of counsel for indigent defendants, the focus in courts-martial proceedings has been centered around the propriety of defense counsel engaging in an adversary role before the military tribunal.

The development of the sixth amendment's counsel provisions in federal criminal trials with respect to indigents began before the

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3 Erickson, *The Standards* **for** *Criminal Justice in a Nutshell* 32 LOUISIANA L. **REV.** 369 (1972). CRIMINAL DEFENSE TECHNIQUES (Cipes ed. 1969).

4 US. COSST. amend. VI.

5 *See* notes 25-41 *infra* and accompanying text; **Avins,** *Accused's Right to Defense Counsel Before a Military Court*, 42 U. DET. L. J. 21 (1964); Wiener,

amendment became law, although at that time ratification was assured. An Act of Congress passed April 30, 1790,[6] authorized the presiding judge in any federal capital prosecution to appoint counsel for the accused if a request was made. The Act was phrased in obligatory terms and was not discretionary. The 1790 Act marks the beginning of the modern interpretation of the constitutional right to counsel in federal criminal trials. Under the Act, the accused had the right to counsel only when he was charged with a capital offense. In all other federal prosecutions, the accused was allowed to appear with his privately retained counsel, but no right to assigned or appointed counsel existed. Between 1790 and the mid-1930's, there was no change in the legal authority for appointment of counsel. During that period, however, the practice of appointing counsel for indigent defendants in noncapital cases became widely recognized in the federal courts. In fact, many federal courts adopted local rules which were designed to administer the appointment of counsel for persons accused of crime who were unable to afford a lawyer.'

In the renowned Scottsboro case, *Powell v. Alabama*,[8] the Supreme Court struck down an Alabama conviction and death sentence when the accused was denied counsel on the grounds that the denial violated fundamental principles of liberty and justice which lay at the base of all of our civil and political institutions. The *Powell* case was a warning to the state courts that the right to counsel in all serious criminal cases might soon be included within the protection afforded by the fourteenth amendment.

Only six years later, in *Johnson v. Zerbst*,[9] the Supreme Court transformed the informal practice followed in the federal courts of appointing counsel in noncapital cases into a constitutional requirement. The majority opinion, written by Mr. Justice Black, made no attempt to analyze the formative history of the sixth amendment to surmise what may have been the founding father's intentions. Rather, the decision rested upon humane policy considerations implicit in the modern criminal law and held:

Courts-Martial and the Bill of Rights: The Original Practice 1, 72 HARV. L. REV. 22 (1958).

6 1 Stat. 118 (1790).

7 *See* N.D. CAL. RULES OF PRACTICE 24 (1926) and DISTRICT OF MARYLAND RULES OF PRACTICE 66 (1933).

8 287 U.S. 45 (1932).

9 304 U.S. 458 (1938).

> The Sixth Amendment withholds from Federal Courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of Counsel.[10]

Although the federal courts were required to grant counsel to an indigent accused under the mandate of *Johnson*, the state courts did not have the right of an accused to counsel in a criminal case forced upon them until *Gideon v. Wainwright*[11] was announced.

Unlike *Johnson*, *Gideon* was an outgrowth of state court criminal trial procedures. Although the right to appointed counsel in federal courts had been firmly established in 1938 by *Johnson*, the development of a similar constitutional right in state courts followed a more uncertain path. Unlike federal prosecutions, any constitutional right to appointed counsel in state prosecutions necessarily had to flow from the sixth amendment through the due process and equal protection provisions of the fourteenth amendment. Initially, the Supreme Court attempted to resolve the issue by applying a "fundamental fairness under the totality of the circumstances" test to the events surrounding each individual state prosecution.[12] It soon became apparent, however, that such a test was not a workable solution. By 1963, the Supreme Court, when confronted with a right to counsel case from a state jurisdiction, was finding special circumstances which required the appointment of counsel in nearly every case which it reviewed.[13] In 1963, the Supreme Court specifically overruled its prior holding in *Betts v. Brady*[14] and formulated a rule to be applied against the various state courts which was similar to the one announced some thirty-one years earlier in *Johnson*.[15] The court stated:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.[16]

In *Gideon* the Supreme Court made it mandatory on every state, through the fourteenth amendment, to provide counsel to every

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[10] *Id.* at 463 (footnote omitted).

[11] 372 U.S. 335 (1963).

[12] Betts v. Brady, 316 U.S. 455 (1942).

[13] See Hendrix v. City of Seattle, 76 Wash.2d 142, 456 P.2d 696 (1969), cert. *denied*, 397 U.S. 948 (1970) for an exhaustive review of these cases.

[14] 316 U.S. 455 (1942).

[15] 304 U.S. 458 (1938).

[16] Gideon v. Wainwright, 372 US. 335, 344 (1963).

indigent defendant who stands before the bar of justice charged with a crime. The decision was silent as to whether the right to counsel under the sixth amendment is restricted to felonies or whether it applies equally to misdemeanors. Shortly after *Gideon* was announced, certiorari was denied in two cases raising the issue of the applicability of the right to the assistance of counsel in misdemeanor or petty offense cases.[17] Because *Gideon* was silent as to its applicability in state misdemeanor trials, nonuniform practices developed in the various state jurisdictions. Diametrically opposed views on the right to appointed counsel in misdemeanor cases appear in *Bolkovak* v. *State*[18] and *City* of *Toledo v. Frazier*.[19] In *Bolkovak* it was declared without hesitation that the accused had the right to appointed counsel, and in equally clear language the *Frazier* case denied counsel.

In an attempt to clarify the right to appointed counsel in both state and federal criminal prosecutions, the Supreme Court granted certiorari to once again review the scope of the sixth amendment's protection.[20] The issue presented to the Court in *Argersinger* v. *Hamlin*[21] was whether the sixth amendment's right to appointed counsel attached in a state misdemeanor prosecution where the accused faced incarceration. Reviewing the language of *Gideon*, the Court reasserted the position expressed there that ". . . assistance of counsel is often a requisite to the very existence of a fair trial."[22] Justice Douglas, writing for the majority, refused to recognize any unique link between the complexity of legal issues involved in any given case and the prospective term of imprisonment and specifically noted that many misdemeanor prosecutions ". . . bristle with thorny constitutional questions.)'[23]

In formulating the new constitutional standard, the Supreme Court drew heavily from the *American Bnr Association Standards* for *Criminal Justice*. The holding of the Court echoes the position set forth in the *American Bnr Association Standards for Criminal Justice Relating to Providing Defense Services*. The Court held that:

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17 Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364, *cert. denied*, 385 U.S. 907 (1966); DeJoseph v. Connecticut, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied*, 385 U.S. 982 (1966).

18 229 Ind. 294, 98 N.E.2d 250 (1951).

19 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967).

20 Argersinger v. Hamlin, 407 U.S. 25 (1972).

21 *Id.*

22 *Id.* at 31.

23 *Id.* at 33.

> [A]bsent a knowing and intelligent waiver, no person may be imprisoned for any petty offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.[24]

Thus, in both federal and state criminal prosecutions today, if the court is to retain the option of sentencing the accused to a term of imprisonment if convicted, counsel must be provided to the indigent accused unless the right is affirmatively and intelligently waived.

The emergence of the right to counsel in Courts-martial proceedings primarily occurred after World War I. Until that time, not only was the right to appointed counsel and the extent of his rights and duties uncertain, but the very right to be represented by counsel before a military tribunal had not been enunciated. In fact, the early decisions involving the right to have defense counsel placed severe limitations on counsel. History discloses that in an early case the general officers charged with the responsibility of reviewing the record did not approve of the participation of counsel. In one written disapproval, the reviewing general stated:

> Should counsel be admitted on behalf of a Prisoner, to appear before a general Court Martial, to interrogate, to except, to plead, to tease, perplex and embarrass by legal subtilties and abstract sophistical distinctions?
>
> However various the opinions of professional men on this Question, the honor of. the Army and the interests of the service forbid it. . . . Were Courts Martial thrown open to the Bar, the officers of the Army would bc compelled to direct their attention from the military service and the Art. of War, to the study of the Law.
>
> No one will deny to a prisoner, the aid of Counsel who may suggest Questions or objections to him, to prepare his defense in writing—but he is not to open his mouth in Court.[25]

Although the opinion is somewhat more strongly worded than the others of its day, it does reflect the attitude which then existed toward defense counsel in court-martial proceedings. In essence, defense counsel, if allowed to be present before the military tribunal at all, was relegated to a purely passive role and the entire burden of presenting a defense rested with the accused himself.[26]

The Civil War caused an increase in the size of the military forces, the number of military courts-martial, and as a result focused attention on the military justice system. In response to that in-

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[24] *Id.* at 37.

[25] 2 Proceedings of Courts-Martial, War Office (mss. in National Archives Record Group 153, Entry 14) 142-143.

[26] Wiener, *Courts-Martial and the Bill* of *Rights, The Original Practice I.*

creased awareness, the Bureau of Military Justice was established in 1864 and was largely responsible for the initial assimilation of the rules of general criminal law practice into courts-martial practice.[27] In an early opinion, General Holt, the first Judge Advocate General of the Bureau, ruled that "the accused is entitled to counsel upon his trial as a *right,* and this right the court cannot properly refuse to accede to him."[28] General Holt also declared: "In this country no such view as that advanced by Napier, of a separation between the general rules of practice on military trials and those prevailing in the courts of law, is known to have been entertained. Such rules are indeed, in our procedure, as far as possible assimilated."[29] Therefore, during the Civil War years, the right to counsel in military tribunals seemingly became firmly established.

With the end of the War Between the States, coupled with the reduction in the size of our military forces, military law regressed. During the thirty years which followed the Civil War, the right to be represented by defense counsel was gradually eroded to the status of a privilege.[30]

However, much like the development of the right to appointed counsel in the federal courts prior to *Johnson v. Zerbst*[31] a practice had developed in the military courts which allowed representation of an accused by defense counsel working within the framework of an adversary role in nearly all general court-martial proceedings. At the turn of the twentieth century, the stage was set for converting a fairly uniform practice into an absolute right and in 1916 the practice became law. Article of War 17 of the 1916 Manual for Courts-Martial provided:

> The accused shall have the right to be represented before the court by counsel of his own selection for his defense, if such counsel be reasonably available . . . .

In 1921, the Manual for Courts-Martial directed the convening authority to appoint defense counsel for the accused both in general and special court-martial proceedings regardless of financial ability to secure private counsel, Thus, as early as 1921, the military justice

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72 HARV. L. REV. 1, 22 (1958); Avins, *Accused's* Right *to Defense Counsel Before a Military Court,* 42 U. DET. L. J. 21, 24 (1964).

27 HARWOOD, U. S. NAVAL COURTS-MARTIAL 254 (1867).

28 WINTHROP, DIG. OP. JAG 1862-68, at 127 No. 1 (3d ed. 1868).

29 WINTHROP, DIG. OP. JAG 1862-68, at 336 No. 1 (3d ed. 1868).

30 WINTHROP, MILITARY LAW AND PRECEDENTS 165 (2d ed. 1895).

31 304 U.S. 458 (1938).

system eliminated the financial ability criteria which so long plagued the federal and state courts.

Although the development of the right to counsel in court-martial proceedings appears to have solidified much earlier in the military than in the federal and state courts, the right provided in the 1916 Manual for Courts-Martial contained a substantial flaw. There was no requirement that the counsel provided to the accused be trained in the law. By present standards, the right to legally trained counsel is essential to the sixth amendment guarantee of effective assistance of counsel. In 1949, the Manual for Courts-Martial was amended to include a provision which suggested prior legal training as a qualification for both the prosecutor and defense counsel.[32] The new provision did not, however, require legal training. In 1951, the Uniform Code of Military Justice was enacted by Congress with a provision substantially similar to that contained in the 1949 Manual for Courts-Martial.[33] Shortly after the Uniform Code of Military Justice became effective, the Court of Military Appeals squarely faced the problem of deciding whether the Bill of Rights applied to servicemen.[34] The court held, rather surprisingly, that in applying the principles announced by the Supreme Court to the military, it ". . . need not concern . . . [itself] with . . . constitutional concepts."[35] The court reasoned that since Congress was charged with the responsibility of supervising the armed services, it was within the province of Congress to define what rights servicemen would receive in court-martial proceedings. The concept of "military due process" established in *Clay* lasted only two years before the Supreme Court rejected the Court of Military Appeals' reasoning and held that "military courts . . . have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."[36] Since 1953, the Court of Military Appeals, as well as the Supreme Court, has reiterated the ruling of *Burns* on a number of occasions. The most important of which may be found in *United States v. Tempia*.[37] In that decision, the Court of Military Appeals removed all remaining doubt by stating, ". . . the protections of the Constitution are available to servicemen

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32 Manual for Courts-Martial, United States, 1949, § 6, at 6.
33 UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 801 *et seq.* (1951).
34 United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).
35 *Id.* at 79, 1 C.M.R. at 79 (1951).
36 Burns v. Wilson, 346 U.S. 137, 142 (1953).
37 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

in military trials." [38] Moreover, the court's opinion made it clear that future controversies involving servicemen's fundamental rights would be controlled by the decisions of the Supreme Court. The Court of Military Appeals stated that it was ". . . bound by the Supreme Court on questions of constitutional import." [39] Today, no question remains that the sixth amendment's right to counsel provision does apply to servicemen.

Justice Clark, in *Kinsella v. Krueger*,[40] had this to say about the military justice system:

> In addition to the fundamentals of due process, it includes protections which this Court has not required a State to provide and some procedures which would compare favorably with the most advanced criminal codes.[41]

In 1968, President Lyndon Johnson signed the Military Justice Act into law and said:

> The man who dons the uniform of his country today does not discard his right to fair treatment under law. . . . We have always prided ourselves on giving our men and women in uniform excellent medical service, superb training, the best equipment. Now, with this bill, we are going to give them first class legal service as well,

In looking to the *American Bar Association Standards for Criminal Justice Relating to Providing Defense Services* as a guide for the military, Kenneth J. Hodson, who played an important role in causing the formulation of the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1969 (Revised Edition), had this to say:

> While, as indicated above, the armed services are more liberal than the Standards in furnishing free counsel to accused, those counsel are usually furnished from the office of the staff judge advocate, who also provides prosecution counsel. This practice has drawn criticism recently and appears to violate the spirit, if not the letter, of Section 1.4 of the Standards for Providing Defense Services, which requires that a defense lawyer have professional independence and be 'subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice.' Pursuant to a recommendation contained in the DOD Military Justice Task Force Report, 1972, the services are now studying the possibility of establishing a separate service-wide defense corps, which would be under the direction of the appropriate Judge Advocate General. Chief obstacle to such a corps

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[38] *Id.* at 634, 37 C.M.R. at 254 (1967).
[39] *Id.*
[40] 351 U.S. 470 (1956).
[41] *Id.* at 478-479 (footnote omitted).

> is the shortage of judge advocates which has resulted from the elimination of the draft.[42]

Thus, the right to counsel has now reached that point where the tripod of justice has a strong defense lawyer to insure that the trial of an accused is fair in the state, federal, and military courts.

III. THE PROSECUTOR

Legal history did not develop in the same fashion for the prosecutor that it did for defense counsel. The right of an indigent-accused to counsel was obtained through gradual extensions of the Sixth Amendment to the United States Constitution to include every criminal case in which the accused faces incarceration.[43]

In the United States, the prosecutor cannot be compared to his English counterpart. In continental Europe, the prosecutor is a career official who generally is appointed and has a closer relationship to the court and less autonomy than a prosecutor in the United States. The differences between the prosecutor in the United States and the English and European prosecutor was summarized well in these words in the Introduction to the *American Bar Association Standards for Criminal Justice Relating to The Prosecution Function*:

> In England prosecution is administered by a Director of Public Prosecutions, who is a career official and a subordinate of a cabinet minister. The actual trial of cases, however, is assigned to barristers in private practice designated as Crown Counsel. **A** British barrister may prosecute for the Crown in one case and act for the defense in others. The Crown Counsel has no part in preliminary decisions as to whether to prosecute or what particular crimes are to be charged; in court he functions as a professional advocate. The Crown Counsel's relationship to the Director of Public Prosecutions is essentially like that of a barrister to the solicitor in a civil case. Justice of the Peace and other courts of limited jurisdiction dispose of the great bulk of all criminal prosecutions--ninety-five per cent or more. Solicitors, private parties, police or other administrative officials conduct prosecutions in these lower courts. Some of the differences in functions also arise from the fact that the rate of guilty pleas in all courts in England is substantially higher than here. Appeal is not allowed as a matter of right.
>
> The American prosecutor, representing the executive branch under a system of divided powers defined in a written constitution, is an officer of the court only in the same sense as any other lawyer. He is not a career

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[42] Hodson, *Use of the* ***ABA*** *Standards in the Military*, -- AM. CRIM. L. REV. -- (Spring 1974).

[43] Argersinger v. Hamlin, 407 U.S. 25 **(1972).**

official or civil servant; relatively few American prosecutors have devoted their entire professional lives to this work. At the state level, he is usually an elected local official, largely autonomous and generally having no ties with the chief officer of the executive branch of which he is a part, not even with the Attorney General of the state.

The American prosecutor, whatever his precise title and jurisdiction, is invariably drawn from the practicing bar and more often than not returns to private practive or seeks other public office after a relatively few years. In most respects, including his autonomy, he is more nearly like the British barrister engaged in prosecution than the prosecutor or procurator of continental Europe. He is generally an active participant in bar associations and other lawyer groups. The two aspects which distinguish him most from his counterparts in both England and Europe are that he is a local and elected official. From the unique characteristics of his office, the American prosecutor derives important strengths, but also certain weaknesses and burdens which sometimes tend to encumber and impair his function.

The history of the development of the concept of unreviewable and unlimited prosecutorial discretion originated in the English common law, but was expanded in the course of the formulation of our common law. Courts which have examined the doctrine trace the common law discretionary power of federal prosecutors to the absolute fiat of the British Attorney General to terminate a prosecution by entry of a *nolle prosequi.*[44] In England, the exercise of the power to *nolle prosequi* was subject to practical limitations which are not present in this country. First, in the great majority of cases, the Attorney General never took part in a prosecution. Second, his responsibility to institute a proceeding arose only in cases of importance to the Crown.[45] Thus, as a practical matter, the number of prosecutions initiated by the Attorney General to protect the integrity of the Crown was small. The prosecution of common offenses in England was left entirely to private persons, or to public officers who possessed few legal powers beyond those held by ordinary citizens.[46]

History also discloses that the Attorney General's right to *nolle prosequi* was usually exercised for one of two limited purposes:

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44 United States v. Woody, 2 F.2d 262 (D. Mont. 1924). Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction,* 65 YALE L.J. 210 (1955).

45 1 CHITTY, A PRACTICAL TREATISE ON CRIMINAL LAW 844 (1816); 4 W. BLACKSTONE, COMMENTARIES *308.

46 1 F. STEPHEN, HISTORY OF CRIMINAL LAW 493 (1883); P. HOWARD, CRIMINAL JUSTICE IN ENGLAND 1-95 (1931); R. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 106-10 (1940).

(1) to dispose of a technically imperfect proceeding instituted by the Crown, or (2) to terminate an oppressive proceeding instituted by private persons.[47] In short, in England, the power to *nolle prosequi* was a benevolent right which was to be exercised for the protection of the English populace.

In the United States, the doctrine of prosecutorial discretion has extended far beyond its predecessor. A comparison of prosecutorial discretion in the United States and England was well stated in a Note in the American Criminal Law Review in these words:

> In the United States, however, the doctrine of prosecutorial discretion has far out-reached its English predecessor. While even Attorney General Taney limited his discussion of prosecutorial immunity to a concededly unjust prosecution, the federal courts extended the logic rather than the spirit of his formulation to almost every prosecutorial activity. While it is true that in England the courts were absolutely barred from disturbing the Attorney General's decision to terminate a prosecution, the right of citizens to bring private prosecutions acted as a counterbalance to this power.
>
> The doctrine of prosecutorial discretion, therefore, does not properly reflect its English origins. Practically, it vests far more power in the federal prosecutors than the English Attorney General exercised; and its propensity to immunize even unlawful acts from judicial sanctions may work injustice on the citizenry, who, in England at least had the power to bring criminals to task or expose the failure to do so. Significantly, even though England has adopted a system of public prosecution, the English courts have recognized that private parties have a right, through the common law writ of mandamus, to compel public prosecutors to enforce the law, where they have announced they will not enforce it.[48]

The broad prosecutorial discretion of the federal prosecutor is greater than that granted to many state prosecutors. A number of cases hold that the mere fact that the prosecutor's "duties rise to the dignity of exercising discretion cannot excuse neglect of duty on his part."[49] In *State ex rel. McKittrick v. Wallach*,[50] the court said:

> *Such discretion must be exercised in accordance with established principles of law, fairly, wisely, and with skill and reason.* It includes the right to choose a course of action or nonaction, chosen not willfully or in bad faith, but chosen with regard to what is right under the circumstances. Discretion denotes the absence of a hard and fast rule or a mandatory procedure regardless of varying circumstances. *That discretion may, in good faith*

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47 J. EDWARDS, THE LAW OFFICERS OF THE CROWN 234 (1964).

48 11 AM. CRIM. L. REV. 577 (1973).

49 State *ex rel.* McKittrick v. Wymore, 345 Mo. 169, 132 S.W.2d 979 (1939).

50 353 Mo. 312, 322-23, 182 S.W.2d 313, 319 (1944) (emphasis added).

(but not arbitrarily), be exercised with respect to when, how, and against whom to initiate criminal proceedings. . . .

Notably, the Missouri Supreme Court emphasized that the prosecutor is guilty of dereliction of duty when he acts arbitrarily or in bad faith. The discharge of his duties in good faith requires that he exercise judgment "according to the dictates of his own judgment and conscience uncontrolled by the judgment and conscience of any other person." [51]

The history of a public prosecutor in the United States appears in the *American Bar Association Standards for Criminal Justice Relating to The Prosecution Function* in the Commentary to Section 2.1 in these words:

> The concept that the state has a special interest in the prosecution of criminal cases which requires the presence of a professionally trained advocate arose during the formative period of American law. Earlier, in England, it had been assumed that prosecution was a matter for the victim, his family or friends. See SCHWARTZ, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 4-5 (1962). The idea that the criminal law, unlike other branches of the law such as contract and property, is designed to vindicate public rather than private interests is now firmly established. The participation of a responsible public officer in the decision to prosecute and in the prosecution of the charge gives greater assurance that the rights of the accused will be respected than is the case when the victim controls the process. Almost all prosecutions of a serious nature in this country now involve a professional prosecutor. The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions which are not consonant with our traditions of justice. The collusive "speed trap" situation is a classic example of law enforcement unleavened by the influence of a professionally responsibible prosecutor.
>
> In a few jurisdictions a private party may bring a prosecution without the participation of the prosecutor. See Comment, 65 Yale L. J. 209, 218-22 (1955). This practice carries danger of vindicative use of the process of criminal law, without the check provided by the participation of a public prosecutor. Standard 2.1 is designed to discourage the practice of police or private prosecution by the adoption of appropriate legislation to require the participation of a prosecutor in all criminal cases except regulatory violations of a minor nature.[52]

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[51] *Id. See* Attorney General v. Tufts, 239 Mass. 458, 132 N.E. 322 (1921); MEYER, *The Power of the Prosecuting Attorney,* in THE PROSECUTOR'S DESK BOOK 13 (National College of District Attorneys 1971); Lezak, *The Prosecutor's Discretion—The Decision to Charge* in THE PROSECUTOR'S DESK BOOK 23 (National District Attorneys' Association 1971).

[52] *See* 1 F. STEPHEN, HISTORY OF CRIMINAL LAW 1 (1883) (footnote added).

Initially, the prosecutor was only guided by broad statements which appeared in the Canons of Ethics.[53] The unique position occupied by a prosecutor was described in these words:

> The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to a partisan advocate must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.[54]

In an effort to further define the obligations of the prosecutor, the American Bar Association caused the *Code of Professional Responsibility* to take the place of the *Canons of Ethics* on January 1, 1970. Later, after defining the obligations of a prosecutor in the *American Bar Association Standards for Criminal Justice Relating to The Prosecution Function*, the duties and responsibilities of a prosecutor were further limited and defined in the Standards. Section 1.1 provides:

> 1.1 The function of the prosecutor.
>
> (a) The office of prosecutor, as the chief law enforcement official of his jurisdiction, is an agency of the executive branch of government which is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the rule of law.
>
> (b) The prosecutor is both an administrator of justice and an advocate; he must exercise sound discretion in the performance of his functions.
>
> (c) The duty of the prosecutor is to seek justice not merely to convict.
>
> (d) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession, and in this report. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in ABX Standards, The Defense Function, section 1.3.
>
> (e) In this report the term "unprofessional conduct" denotes conduct which is or should be made subject to disciplinary sanctions. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are not intended as

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[53] *E.g.*, ABA CANONS OF ETHICS No. 5; Rerger v. United States, 295 U.S. 78 (1935).

[54] *Professional Responsibility: Report of the Joint Conference*, 44 **A.B.A.J.** 1159, 1218 (1958).

criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

By way of further limitation, DR 7-103 of the *American Bar Association Code of Professional Responsibility* provides:

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.[55]

The thrust of the *American Bar Association Standards Relating to The Prosecution Function,* the *Code of Professional Responsibitity,* and the case law which addresses the role of the prosecutor is to instill a sense of responsibility in the prosecutor beyond the narrow role of advocate. Although the prosecutor is indeed the advocate representing the state's interests, his primary duty is not to convict but to see that justice is done.[56] The Standards attempt to clarify that paramount responsibility by eliminating the secrecy surrounding the state's conduct of a criminal prosecution and by requiring the prosecutor to take affirmative action to insure that any person accused of crime is afforded a fundamentally fair opportunity to rebut the state's case against him.

The prosecutor's office in the military is, in this respect, no different from the state or federal prosecutor's office. The duties placed upon the military prosecutor to insure that the accused is adequately protected have been officially recognized for nearly a century.'"[57]

Although the early military practice of denying the accused the right to defense counsel and relying upon the military prosecutor to protect the serviceman's rights has been recently condemned by the Supreme Court,[58] the fact remains that the military's recognition

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[55] *See* Giles v. Maryland, 386 US. 66 (1967); Brady v. Maryland, 375 U.S. 83 (1963); Napue v. Illinois, 360 US. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935).

[56] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 150 (1936).

[57] Manual for Courts-Martial, United States, 1898, at 91. *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.).

[58] O'Callahan v. Parker, 395 U.S. 258 (1968). *See also Justice and Captain Levy,* 12 COLUM. F. 66 (1969).

of the prosecutor's dual role—advocate for the state and protector of justice—predates the adoption of a similar philosophy in the civil courts. Moreover, the criticism leveled at the military prosecutor in *O'Callahan* has been effectively neutralized by subsequent modifications of military criminal procedures.[59]

The prosecutor's role, whether military or civilian, carries with it grave responsibilities. He is charged with the critically important task of seeing not only that the guilty are convicted but also that justice is done. The Uniform Code of Military Justice, the vast body of both state and federal case law, and the *Standards for Criminal Justice* recognize those responsibilities and incorporate provisions designed to assist the prosecutor in his task.

IV. THE TRIAL JUDGE

Although the prosecutor and the defense lawyer are essential to our adversary system, the trial judge can precipitate error or cause a trial to be fundamentally unfair.[60] Those who have experience with the adversary system recognize that the power of the trial judge is such that he can control the outcome of a case. As a result, independence of the trial judge from political, command, or community pressures is essential.[61] The quest for an independent judiciary and for a trial judge who is beholden to no one and bound to follow only the commands of the law has been stormy.

For centuries there was no such thing as a separate and independent judicial power in England. Before the seventeenth century, judges were creatures of the king, holding office at his pleasure and subject to instant dismissal if they rendered any decision that displeased him. When he died, out of office they went, to be replaced by creatures of the new king. Job security was unheard of, let alone independence of mind. The judge most likely to succeed was the one best able to guess what the king expected of him. It is hardly a wonder that judicial corruption grew rampant.[62]

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[59] *See* Military Justice Act of 1968, 10 U.S.C. § 801 *et seq.* (Pub. Law **So.** 90-632 (Oct. 24, 1968)). Quinn, *Prosecutorial Discretion: An Overview of Civilian and Military Characteristics*, 10 SAN DIEGO L. REV. 1 (1973).

[60] *See In re* Dellinger, 461 F.2d 389 (6th Cir. 1972); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS (1970); MACMILLIAN, THE ETHICS OF ADVOCACY (American College of Trial Lawyers ed. 1972).

[61] ABA STANDARDS RELATING TO COURT ORGANIZATION, *Competent and Independent Judges*, § 1.20 (Tent. Draft, 1973).

[62] See HAYNES, SELECTION AND TENURE OF JUDGES (1944); Hyde, *Judges: Their*

The judges' resistance to the king became a trend culminating in the reforms of the late seventeenth century. When in **1640,** Charles I was compelled to convene the Long Parliament, it demanded that judges be secure in office during good behavior. The demand was symptomatic of the struggle for separation of powers, and it grew vociferous when Cromwell and Charles the Second removed judges at will to maintain a loyal court. In **1680** Parliament again petitioned the king, Charles the Second, for judicial tenure; but it took the Revolution of **1688** and the fall of the Stuarts to bring about at last the Act of Settlement of **1701** establishing tenure during good behavior. Henceforth, a judge who not only behaved himself but behaved like an independent judge was entitled to stay on the job.

The long struggle was not lost on the American colonists. The United States Constitution, in Article 111, assures tenure and salaries for the federal judiciary except in cases warranting impeachment.[63]

Moreover the events from **1775** to **1790** convinced the colonists that an unchecked legislature was potentially as tyrannical as an unchecked king.[64] Such men as John Adams and James Madison were as much on guard against elective despotism as executive despotism.

Following the Declaration of Independence, several of our new states vested the responsibility for judicial appointment in the Governor. However, the colonies, after having suffered bitter experience with Royal Governors and their appointments, placed restrictions and safeguards on the appointment of judges. Pennsylvania and Delaware looked to the legislature for approval of the gubernatorial appointments. In Massachusetts, New Hampshire, and Maryland, the Governor's Council determined whether the Governor's appointment should be approved, and in New York there was a Special Council of Appointment which consisted of the Governor and certain members of the Legislature. When the Federal Government, through the Constitution, provided for its judiciary, the power of appointment was placed in the President with the advice and consent of the Senate.[65]

Selection and Tenure, 22 N.Y.U.L. REV. **389 (1947); Graham,** *Historical Independence of the Judiciary,* **14 BAR BRIEFS 71 (1937).**

63 *See* TRAYNOR, *Who Can Best Judge the Judges?* **in SELECTED READINGS ON JUDICIAL SELECTION AND TENURE** *(American Judicature Society* **1967).**

64 *See* **Sharp,** *The Classical American Doctrine* of *"The Separation of Powers,"* 2 *U.* CHI .L. REV. 385 (1935).

65 *See* **Erickson,** *Will Colorado's Efforts to Improve the Administration of Justice Help Montana?,* 33 MONT. L. REV. 1 **(1972).**

Today, the American Bar Association has attempted to spell out the duties and responsibilities of the trial judge.[66] Historically, in both state and federal courts, a trial judge's duties and responsibilities were dealt with on a case-by-case method and by the promulgation of rules of court, evidentiary decisions, and by the development of opinions relating to ethical standards for both lawyers and judges.[67]

In contrast, the military has continually been criticized for command influence which was directed to the law officer in court-martial proceedings.[68]

It is axiomatic that the adversary process, which is the keystone of our system of justice, requires that the trial judge exercise the role and perform the function of causing his judicial powers to be used in such a way as to give the jury, if trial is to a jury, an opportunity to decide the case without considering irrelevant issues and appeals that have been made to passion and prejudice.[69]

A trial judge must maintain an atmosphere in the courtroom that is appropriate to a fair, rational, and civilized determination of the issues and must govern the conduct of all persons in the courtrooni, including the lawyers. He must maintain order and must impartially, but in a firm and dignified manner, administer justice. His basic duties are defined in the *American Bar Association Standards for Criminal Justice Relating to The Function of the Trial Judge.*[70] His general responsibilities are set forth in these words in the Standards:

> 1.1 General responsibility of the trial judge.
>
> (a) The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the

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66 ABA STANDARDS FOR CRIMINAL JUSTICE RELATING TO THE FUNCTION OF THE TRIAL JUDGE (1972).

67 ABA CODE OF PROFESSIONAL RESPONSIBILITY (1971); ABA CODE OF JUDICIAL CONDUCT (1972).

68 *But compare* Gosa v. Mayden, -- U.S. -- (1973), *with* O'Callahan v. Parker, 395 U.S. 258 (1968).

69 Gitelson & Gitelson, *A Trial Judge's Credo Must Include his Affimative Duty to be an Instrumentality of Justice,* 7 SANTA CLARA LAWYER 7 (1966-67).

70 §§ 1.1-1.7.

guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.

(b) The trial judge should require that every proceeding before him be conducted with unhurried and quiet dignity and should aim to establish such physical surroundings as are appropriate to the administration of justice. He should give each case individual treatment; and his decisions should be based on the particular facts of that case. He should conduct the proceedings in clear and easily understandable language, using interpreters when necessary.

(c) The trial judge should be sensitive to the important roles of the prosecutor and defense counsel; and his conduct towards them should manifest professional respect and be courteous and fair.

The Military Justice Act of 1968[71] has created a military judge to replace the venerable law officer and has given the military judge functions and powers that are strikingly similar to those of a federal district judge and has met the requirements of the Standard.[72]

Historically, the military courts have continually proclaimed the independence of a military judge or law officer.[73] In *United States v. Berry*[74] the court said:

> The complete independence of the law member and his unshackled freedom from direction of any sort or nature are, we entertain no doubt, vital, integral, even crucial elements of the legislative effort to minimize opportunity for the exercise of control over the court-martial process by any agency of command.

The caustic condemnations of military justice which Mr. Justice Douglas made in *O'Callahan*[75] do not justify a charge of command influence in today's military justice system.[76]

In *United States* v. *Priest*[77] the law officer had a pretrial conference with the Staff Judge Advocate concerning one of the charges and specifications and sought the government's reaction to his contemplated ruling that the specification did not state the offense

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71 UNIFORM CODE OF MILITARY JUSTICE arts. 1-140, 10 U.S.C. §§ 801-940 (1970).

72 S. REP. No. 1601, 90th Cong., 2d Sess. 3 (1968). Miller, *Who Made The Law Officer A Federal Judge?*, 4 MIL. L. REV. 39 (1959).

73 L. I. Ashlock, *The Military Trial Judge*, 1972 (unpublished doctoral thesis in George Washington University Library).

74 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952).

75 395 U.S. 258 (1968).

76 *See* Nichols, *The Justice* of *Military Justice*, 12 WM. & MARY L. REV. 482 (1971); Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 46 MIL. L. REV. 77 (1969); Moyer, *Procedural Rights* of *the Military Accused: Advantages Over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970).

77 19 U.S.C.M.A. 446, 42 C.M.R. 48 (1970).

which was charged, but did state a lesser included offense. In declaring that the law officer's procedure was prejudicially erroneous, the Court of Military Appeals held that the law officer, by taking part in the pretrial conference, "departed from the impartial and independent role assigned to him by the Congress and affirmed by the decisions of this court." Colonel John Jay Douglass[78] set forth his conclusions about command influence in these words:

> In actual practice, military judges consider themselves totally independent of local convening authorities. As a result, the problem of common influence on the military judge rarely arises. Commanders and staff judge advocates are so apprehensive of prejudicing a case by even the appearance of contact with the military judge that the military judge has come to be isolated within the military community. He is not consulted on any legal problems, except those involving court administration. In general, every effort is made to prevent the slightest appearance of command influence....

Moreover, on January 9, 1973, the Army published Uniform Rules of Practice Before Army Courts-Martial.[79] The Uniform Rules of Practice specifically provide that the new *American Bar Association Code of Judicial Conduct* and the *Code* of *Professional Responsibility* and, unless "clearly inconsistent" with existing law. the *American Bar Association Standards for Criminal Justice Relating to Fair Trial and Free Press, The Function of the Trial Judge,* and *The Prosecution Function and The Defense Function* shall apply to judges, counsel, and clerical support personnel of all Army courts-martial.

Thus, both the military courts and the civil courts have looked to the Standards as a means of defining the rights, duties, and responsibilities of the trial judge in handling a criminal case.

V. CONCLUSION

The *American Bar Association Standnrds on The Prosecution Function and The Defense Function* encourage advocacv within the framework of the adversary system. To the layman, the role of all lawyers is to see that justice is done. The history of our adversary svstem teaches us that the search for truth and justice can only be'achieved by creating a tripod of justice consisting of a

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78 Colonel, JXGC [Ret.], Commandant, The Judge Advocate General's School, 8 June 1970-31 January 1974.

79 U.S. DEP'T OF ARMY, PAMPHLET No. 27-9, MILITARY JUDGES' GUIDE, App. H. (1973).

competent and ethical prosecutor and defense lawyer in a court that is presided over by an independent and impartial trial judge.

The trial judge, of course, must serve in a capacity that is broader than that of a referee. His responsibilities have been dealt with earlier in this article, and only the uninitiated could conclude that his role is not the most important in reaching a just result.

The *American Bar Association Standards for Criminal Justice Relating to The Function of the Trial Judge* focus on the basic responsibilities of the trial judge.[80] In addition, when the trial judge's functions are reviewed in connection with the other seventeen *Standards for Criminal Justice,* it becomes apparent that procedures are now delineated which govern every stage of the trial from the judge's first pretrial contact with the case to the last post-conviction remedy.[81]

In drafting the *Standards Relating to The Function* of *the Trial Judge,* the Special Committee had the benefit and use of the work done by the American College of Trial Lawyers.[82] Moreover, the Special Committee attempted to weave into the final draft coordinating provisions which caused the Standards to dovetail with all other Standards, the Code of Professional Responsibility and the Code of Judicial Ethics, so that the Standards, as a whole, will provide an integrated set of rules and regulations for the handling of every phase of a criminal case.

Efforts are being made in every state to cause the *Standards for Criminal Justice* to be implemented and put into use in state court criminal procedures, but adoption of the Standards as a whole, with minor modifications, has only occurred in Arizona and Florida. However, implementation in the military justice system has occurred. In a continuing effort to upgrade military justice for the armed services, all of the armed services have acted on the *American Bar Association Standards for Criminal Justice.* Kenneth J. Hodson provides this summary regarding the implementation of the Standards in the military justice system:

> In August 1972, both the Army and Air Force Judge Advocates General issued directives to the effect that the Standards, to include the Code of Professional Responsibility and Code of Judicial Conduct, would be applicable to military justice procedures, unless they are inconsistent with the Uni-

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80 §§ 1.1-1.7.

81 §§ 3.1-3.9, **4.1-4.3,** 5.1-5.13, 6.1-6.11, **8.1,** and **8.2.**

82 AMERICAN COLLEGE OF TRIAL LAWYERS CODE OF TRIAL CONDUCT (1972); AMERICAN COLLEGE OF TRIAL LAWYERS REPORT AND RECOMMENDATION ON DISRUPTION OF THE JUDICIAL PROCESS (1970).

form Code of Illilitary Justice, as implemented by the Manual for Courts-Martial, and applicable departmental regulations. 2 Army Lawyer *So*. 8, pp. 12-13 (August 1972); para. 1-11, AFM 111-1, 30 August 1972. Although the Navy and Coast Guard hare issued no formal directives with respect to the Standards, they served as a guide for trial court rules issued by the Coast Guard. The Navy is implementing the Standards through judicial channels, i.e., the Chief of the Navy-Marine Corps Judiciary Activity is encouraging trial judges to use the Standards as a guide in determining issues at the trial level. Additionally, the Navy has currently prepared "Uniform Rules of Practice before Nary and Marine Court-Martial" as Navy JAG instructions that are similar to the Army and Air Force directions. A recent sample surrey showed that eight out of nineteen Navy-Marine Corps trial judges had cited the Standards on the record in disposing of procedural questions.[83]

Thus, it is apparent to every lawyer that the tripod of justice, with the education provided by history, becomes stronger every year and serves as a true base for the adversary system to achieve justice.

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[83] Hodson, *Use* of *the ABA Standards in the Military*, -- AM. CRIM. L. REV. -- (Spring, 1974).

COMMENT

THE BUY AMERICAN ACT: EXAMINATION, ANALYSIS AND COMPARISON*

Captain Charles W. Trainor**

I. INTRODUCTION

The Buy American Act of 1933, as modified by Executive Order 10582, grants a preference to domestic manufacturers offering domestic products when goods are sought for governmental use. This article will trace the legislative history of the Act, its development up to and including the 1949-1954 anti-act movement, and culminate with the impact of the 1954 Executive Order. The article will then focus on the Armed Services Procurement Regulations [as they apply to the Buy American Act of 19331 and procurement practices utilized by the Department of Defense. The text will discuss the major exceptions to application of the buy-at-home policy, specifically the Canadian and Norwegian exceptions. The article will then enter the international arena, examining first the buy-national provisions of the General Agreement on Tariffs and Trade, and second, the Most-Favored Nations Clause. These provisions will be considered with the previous discussion of the Canadian-Norwegian exception to the Buy American Act and a determination will be made as to whether present procurement practices are inconsistent with these international commitments. Finally, the paper will examine government procurement practices in Europe, North America, and Japan, looking specifically at the requirements individual countries have specified for prospective suppliers and the different way, if any, that these countries treat a foreign bidder as opposed to a domestic bidder at the time of award or solicitation.

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* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Twenty-First Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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The study does not criticize the Act's concept, but rather some aspects of its application. The administration of the Act in certain areas defeats its intended purpose; while in other areas administrative bureaucracy prevents the smooth and efficient operation of the Act by complicated and inaccurate tests. The article will point out that, although the Act and its application have faults, these faults are not of sufficient magnitude to prevent its conceptual basis from being the most equitable in granting domestic preference in world trade markets.

II. THE BUY AMERICAN ACT

From 1920 through **1933,** the United Kingdom, hoping to stimulate a sagging postwar economy, established a Buy-British policy for all materials and supplies to be used in public projects.[1] In Washington, the United States Congress heard both Representatives and Senators seek protective legislation for domestic industry and labor to combat the British policy.[2] With the economic plight of the Nation squarely upon his shoulders, President Hoover sent a message to the Speaker of the House, Mr. John Nance Garner, suggesting that:

> Instances arise from time to time in the procurement of supplies and equipment by the various Governinent services where, due to requirements of existing law, it becomes necessary to award contracts for materials of foreign origin notwithstanding that suitable articles of domestic production or manufacture are available. By special provisions of law the War and Navy Departments have been enabled, during the current fiscal year. to give preference to American goods except where to do so would lead to unreasonable costs.
>
> I am informed, however, that other departments are not authorized to extend such a preference. It would be of substantial advantage to American manufacturers and producers if Congress should authorize all departments and Executive establishments uniformly to give this preference, and I suggest the enactment of legislation providing that in advertising for proposals for supplies, heads of departments shall require bidders to certify whether the articles proposed to be furnished are of domestic or foreign growth, production, or manufacture, and shall, if in their judgment the excess cost is not unreasonable, purchase or contract for the delivery of articles of the growth, production, or manufacture of the United States, notwithstanding that article of foreign origin may be offered at a lower price.[3]

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[1] Gautt and Speck, *Domestic v. Foreign Trade Problems In Federal Government Contracting: Buy American Act and Executive Order,* 7 J. OF PUBLIC LAW 378, 379 (1958).

[2] *Id.*

[3] *Hearings on H.R. 6744, 8017, 2909, and 9308 before a Subcomm.* of *the House*

As a result of the President's strong support for what would be known as buy-national legislation, Congressional bill hoppers overflowed with proposed legislation. Many of the proposed bills, however, were accurately described by Representative Granfield when he stated that:

> There are, however, certain bills before the committee which are too drastic and "shoot beyond the mark," so to speak. These bills require the heads of the several governmental departments to purchase "only articles and materials grown or produced and manufactured in the United States." While this language gives preference in the purchase of domestic articles to the Government, it would in some instances interfere with the rights of the Government to purchase articles manufactured by American capital and labor from raw materials of foreign growth. There is serious objection to the language, "articles and materials grown or produced and manufactured in the United States." This language ought to be changed to conform with the language employed by the President. . . .[4]

Accompanying these ultra-restrictive proposals was voluminous testimony by the interest groups most benefited by the proposals. These interest groups espoused viewpoints that, although not as relevant then because of the very small Federal budget, are very relevant today. Mr. Pugh, of the Common Brick Manufacturers Association of America, commented that the money expended under Federal appropriations was supposed to diffuse the benefits of the program over the nation, but this purpose was not being achieved. In fact, the contracts went to a few select companies, and products came from overseas rather than from the United States.[5] Other testimony indicated that the cement being used on the Hoover Dam project was imported from Belgium and that furniture for a Federal building was being bought from South America and Czechoslovakia.[6]

Several bills reached committee. House Resolution 6744, introduced by Representative Florence D. Kahn of California,? called for buy American only, to the exclusion of all foreign purchases whether for use domestically or outside the United States.[8] The executive agencies that reviewed this bill found it impracticable and

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Comm. on Expenditures In the Executive Departments, 72d Cong., 2d Sess., pp. 47-48 (1932).

[4] *Id.* at 32.

[5] *Id.* at 69.

[6] *Id.* at 61.

[7] *Id.* at 47.

[8] *Id.* at 47.

unenforceable. John W. Doak, Secretary of Labor, posited that the bill was deficient in two areas: the proposal was unenforceable and the bill needed to contain exceptions to cover supplies purchased abroad for use abroad.[9] The Secretary of State also commented that the federal government needed the power to purchase abroad those items that would be used abroad and that it would be economically impractical to purchase goods in the United States and ship them abroad.'" The Attorney General best summarized the deficiencies of this proposed legislation in a letter stating:

> H.R. 6744 seems to be open to serious objection in that it forces the Federal Government to buy domestic articles, notwithstanding prices may be exorbitant as compared with foreign made goods, and also because it would be difficult to apply, as Government contracting officers would be called upon to trace the source from which contractors secured their supplies and materials.[11]

Thus, H.R. 6744 found little acceptance and was shelved.

Subsequently, Charles H. Martin introduced House Resolution 9308[12] that proposed a buy American policy with three exceptions. First, items would be purchased abroad for 'use abroad; second, foreign items could be purchased for scientific-experimental use; and third, foreign goods could be purchased when similar products were not produced in the United States.[13] Like H.R. 6744, this Bill did not make it out of Committee.

The Honorable Wilbur M. White introduced House Resolution 8017 calling for the

> . . . purchase of U.S. made, grown, produced goods, unless in the discretion of the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Attorney General, the Secretary of the Navy, the Secretary of the Interior, the Secretary of .Agriculture, the Secretary of Commerce, or the Secretary of Labor the interests of the Government will not permit, purchase or contract for, within the U.S. . . .[14]

Mr. White's resolution called for a restriction on the purchase of materials for all Federal construction to materials made or manufactured in the Cnited States; with respect to interchangeable or

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[9] *Id.* at 53.
[10] *Id.* at 53.
[11] *Id.* at 54.
[12] *Id.* at 48-49.
[13] *Id.* at 55-56.
[14] *Id.* at 55.

substitute materials, preference would be given to those grown, produced, or manufactured in the United States.[15]

A provision similar to H.R. 8017 was proposed by the Representative from Louisiana, Mr. Wilson J. Riley. His proposal[16] required executive departments and establishments, as well as Government contractors and subcontractors, to purchase and use domestic articles and materials, to require the specification of alternate materials for construction, and to give preference to materials and articles produced, grown, or manufactured locally.[17] This bill, as others embodying similar provisions, received a great deal of support from the construction industry, particularly the cement industry;[18] as was the case with the other legislation providing favored treatment, it was not accepted.

On December 15, 1932,[19] a compromise bill, composed of elements from the previously mentioned proposals, passed the House of Representatives and was referred to the Committee on Appropriations for the United States Senate."

Led by its Senate sponsors, the present text of the Act met its first test on the Senate floor.[21] Senator Vandenberg described the legislation as "primarily . . . an employment measure conceived in the notion that American tax money should maintain American labor in a moment of American crisis and exigency."[22] Senator Vandenberg continued:

> It appears to me that in a time like this, when we are beset upon all sides with an inescapable and unavoidable responsibility to provide employment for unemployed American people, we have a right to draw the line . . . in defense of American industry and American employment, when we are spending American tax funds. Why have American made-work programs which makes work in Europe or Asia? I am not blind to the need for export trade. I am speaking solely of government funds and their expenditure. Mr. President, the American Treasury is not the world's community chest.[23]

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15 *Id.* at 56-67.

16 *Id.* at 58.

17 *Id.* at 58-60.

18 *Id.* at 61.

19 *Hearings on H.R. 12445-13534 Before the Subcomm. of the House Comm. on Appropriations*, 72d Cong., 2d Sess., contained in JAGO-Hearings, House and Senate, Vol. 9, Tab. C (1932). [hereinafter cited as *1932 Hearings]*

20 *Id.*

21 76 CONG. REC. 2,868 (1933).

22 76 CONG. REC. 3,354 (1933).

23 *Id.*

On January 10, 1933, the Act passed the Senate" and was signed into law by President Hoover on his last dav in office, March 3, 1933, with an immediate effective date.[25]

The Act was intended to stimulate the American economy, increase American employment, and abate the unfortunate conditions resulting from the great depression.[26]

> The Act itself generally provides that. (1) only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, or (2) only such manufactured articles, materials, or supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States shall be acquired for public use.[27]

The first impact[28] of the Act came seven days after its effective date. Construction on the Hoover Dam Project had alreadv- begun at the time of the legislative hearings on the Act. The original date set for the opening of bids for hydraulic equipment for the dam was February 3, 1933; however, due to the introduction of the proposed legislation in the Senate, the opening date was postponed until March 10th. The Act, effective on March 3d, disqualified six foreign bidders for the contract—the six low bidders.[29]

One area of confusion in the original bill was what constituted an unreasonable domestic bid. Absent specific guidelines, Federal agencies adopted criteria by which to measure the unreasonableness of a domestic bid. The agencies

> . . . in 1934 [began] to follow a principle originally laid down by the Treasury Department's general procurement bureau, that a domestic bid or cost was not to be considered "unreasonable" unless it exceeded the corresponding foreign bid or cost by twenty-five percent.[30]

Subsequently, this method of determining the reasonableness of domestic offers was specifically adopted by Executive Order.

The exception to the purchase of domestic materials requirement comes into play when the head of a procuring agency determines

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24 *1932 Hearings, szrpra* note 19.

25 *Id.*

26 Watkins, *Effects* of *The Buy American Act on Federal Procurement,* 31 FED. BAR J. 191 (1972).

27 Reynolds and Phillips, *Evaluation Procedures Under Buy American Act and Executive Order,* 3 PUB. CONTRACT L. J. 219 (1970).

28 Gautt and Speck, *supra* note 1, at 380-381.

29 *Id.*

30 Knapp, *The Buy American Act: A Review and Assessment,* 61 COLUM. L. REV. 430,431 (1961).

that the purchase of an unreasonably priced domestic product would be inconsistent with the public interest.[31] Since cost is the material factor in determining whether the public interest is being served when foreign products are purchased, the agency head must make a finding that the payment of this unreasonable cost is not in the public interest prior to the contract award.[32] Absent such a determination, an award to a foreign offeror would result in an invalid contract.[33] This determination has been deemed to be a factual one, solely within the competence of the agency head, and not subject to review by the Comptroller General,[34] but other socio-political or intangible factors may not be used to support the decision of the agency head.[35]

The Act sets forth other criteria governing its application. The first of these is the "Public Use" requirement.[36] There has been very little fluctuation in the meaning of this term; the Congressional intent clearly required the purchase, for public use within the United States, of articles, materials, or supplies manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, unless the head of the department or independent establishment concerned determines that the purchase is inconsistent with the public interest or their cost is unreasonable.[37] Whenever the articles are to be used by the United States, the public use criterion is applicable.[38] If the articles are not to be used by the United States, but by a private concern or school, they do not fall within the Act's provisions and the public use requirement is not applicable, notwithstanding the possibility that the articles might have been purchased with Federal funds.[39] Likewise, the Buy American Act does not apply to indemnity contracts because they do not meet the public use criterion.[40] The public

31 "Buy American Act," popular name for American Materials Required for Public Use, Mar. 3, 1933, ch. 212, Tit. III, 47 Stat. 1520 [now 41 U.S.C. §§ 10(a)-(c)]. [hereinafter cited as *Act of 1933*].

32 COMP. GEN. DEC. B-161191 (June 9, 1967) [Unpublished].

33 16 COMP. GEN. 1105 (1937). However, today when the bid of the domestic offeror exceeds the established differentials it is deemed to be unreasonable notwithstanding the lack of a Secretarial determination.

34 COMP. GEN. DEC. B-173667 (October 7, 1971) [Unpublished].

35 COMP. GEN. DEC. B-161191 (June 9, 1967) [Unpublished].

36 COMP. GEN. DEC. B-163399 (Jul. 9, 1968) [Unpublished].

37 COMP. GEN. DEC. B-152975 (Dec. 17, 1963) [Unpublished].

38 COMP. GEN. DEC. B-168434 (Apr. 1, 1970) [Unpublished]; COMP. GEN. DEC. B-163399 (Jul. 9, 1968) [Unpublished].

39 COMP. GEN. DEC. B-168434 (Apr. 1, 1970) [Unpublished].

40 COMP. GEN. DEC. B-163878 (May 27, 1968) [Unpublished].

use criterion does come into play when leased materials are involved,[41] if these materials are leased for public use. This criterion is not one of the legislation's major stumbling blocks for the definition of the term "Public Use" was of sufficient clarity to avoid the need for judicial interpretation.

Likewise, the purchase of foreign goods for use abroad caused little furor. Unlike some of the other proposed legislation, the Act did not in all cases preclude the purchase of foreign goods for use abroad.[42] The Comptroller General has stated

> [t]he Buy American Act which gives preference to domestic production in Government procurement is not for application in the procurement of supplies for use at bases leased from foreign governments where the United States does not have complete sovereign control.[43]

The Act is, however, applicable in the territorial United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands. According to the Act, "United States" is used to mean United States proper and any place subject to its jurisdiction.[44] The term, "subject to the Jurisdiction of the United States," although broad in scope, has been narrowed in application. The Pacific Trust Agreement[45] gives the United States the right to exercise sovereign powers over the area indicating that the Act would be or should be applicable.[46] However, *Burna v. United States*'" stands for the proposition that the Pacific Trust Territories are not within the definition of United States for the purposes of the Act.

The Comptroller General has adopted a functional approach in this area. The "ultimate place-of-use" of the materials determines whether the procurement is subject to the Buy American Act or not.[48] Thus, a product purchased for domestic use would be subject to the Act while a product purchased for foreign use would not. Likewise. the Buy American Act is applicable onlv to construction

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41 46 COMP. GEN. 47 (1966).

42 *Act of 1933*, § 10a, ***supra*** note 31; see COMP. GET. DEC. B-158155 (Jan 27, 1966) [Unpublished].

43 34 COMP. GEN. 448 (1955).

44 1946 Proc. No. 2696, July 4, 1946, Fed, Reg. 7517, 60 Stat. 1352, Amending the Buy American Act of 1933, 41 U.S.C. §§ 10(a)-10(c) (1970).

45 61 Stat. 3,301 (1947).

46 Gautt and Speck, ***supra*** note 1.

47210 F.2d 720 (4th Cir. 1957), see ***also*** Callas v. United States, 152 F. Supp. 17 (E.D.N.Y. 1957).

48 49 COMP. GEN. 176 (1969).

contracts performed in the United States and not to the performance of such work outside the United States.[49] The problem with this approach is the classification of items placed in storage for ultimate use in either the domestic or foreign sphere. It would appear that as long as the ultimate place of use is undecided and the items are placed in storage, a presumption of domesticity should be made and the principles of the Act applied. This interpretation is consistent with the Act's legislative intent—to help the domestic manufacturer. A contrary interpretation would negate those benefits intended for the domestic producer and return him his pre-1933 status.

The Act requires that the product be mined, produced, or manufactured in the United States. Products "mined" within the geographical United States have produced little or no problems.[50] The real problem has been encountered in applying the terminology "manufactured in the United States." The Act, its legislative history, and the Comptroller General all failed to define what was meant by the term "manufacture." [51] The Comptroller General adopted a case-by-case approach, deciding each question as it came before him,[52] often taxing the dictates of consistency. One of his most often followed definitions of "manufactured in the United States" was published in 1966.[53] Under this definition, if a supplier can show that two stages of manufacturing took place within the United States, he insulates earlier foreign mining, production, or manufacturing from the application of the Act. Thus, foreign ores may pass through states of concentration, refining into billets, rolling into sheets or bars, manufacture into parts, and assembly into a piece of equipment, all before the equipment is acquired by the United States producer and all the stages, except the last two, may be beyond the coverage of the Act.[54] This is possible because of the present test used to determine a foreign or domestic item. Briefly stated, the test requires that to be classified as domestic the end item must be composed of components at least fifty percent of which were grown, produced, or manufactured within the United States. What developed seem to be a negative definition of what

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49 COMP. GEN. DEC. B-163937 (May 29, 1968) [Unpublished].

50 SPECK, *Buy American Act—Basic Principles and Guidelines* in THE GOVERNMENT CONTRACTOR BRIEFING PAPERS 2 (December 1970).

51 *Id.*

52 *Id.* at 3.

53 45 COMP. GEN. 658 (1966).

54 Id.

was not manufacturing. The cutting of tea subsequently imported into the United States was not nianufacturing within the scope of the Act.[55] Likewise, the making of nails from Belgian wire was not manufacturing,[56] while the twisting of wire into wire thread was manufacturing.[57] One decision went so far as to hold that the placing of German lime in buckets manufactured in the United States was a manufacturing process sufficient in degree to result in a domestic product.[58]

In one area of manufacturing the Act of 1933 was clear: a literal reading of the Act indicates there is no preference in favor of the domestic manufacturer over the foreign manufacturer where the materials are not available in the United States. The Comptroller General has found that there is no preference for domestic manufacturers of corkboard over foreign cork or of emetine over foreign ipecac root.[59] This reasoning, although apparently consistent with the Act, defeats its purpose. If the Act is intended to aid the domestic economy by prefering a domestically produced item over that of foreign manufacture, why should a domestically produced item using foreign components not be granted the same preference? The greatest cost of production in modern context is usually labor. Thus, if the Act's purpose is to keep tax dollars within the United States, why not give a preference to tax dollars being paid to labor as well as to tax dollars being paid for component or raw material production? The Comptroller General's decisions and the Act clearly overlook this obvious point, This is one of the major areas, possibly the most important, in which reform is necessary to bring viability to the Act in today's marketplace.

Construction contracts provide their own particular twist to the requirement of "mined, produced, and manufactured within the United States."

> If the construction of public buildings or public works is considered, the Act may be regarded as applying to three stages. The public work itself will, of course, be in the United States, the construction materials used in that work must have been mined, produced, or manufactured in the United States, and, in the case of manufactured construction materials, the components must have been mined, produced, or manufactured in the United States.[60]

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55 COMP. GEN. DEC. A-46052 (Dec. 20, 1932) [Unpublished].

56 COMP. GEN. DEC. B-154501 (Aug. 11, 1964) [Unpublished].

57 39 COMP. GEN. 435 (1939); *cf.* COMP. GEN. DEC. B-112722 (November 24, 1952) [Unpublished], 2 Op. JAG 134 (1952).

58 43 COMP. GES. 306 (1963), orerruled by 46 COMP. GEN. 784 (1967).

59 28 COMP. GEN. 591 (1941).

60 Gautt and Speck, *supra* note 1, at 381.

> Thus, the Act applies only to the last two stages; as the last stage, the end products acquired for public use must have been mined, produced or manufactured in the United States and, as the next to the last stage, manufactured end products must have been manufactured from materials or components mined, produced, or manufactured in the United States.[61]
>
> Beyond these two (in the case of construction, three) last stages, the Act does not apply and foreign supplies may be used.[62]

By its own terms, the requirements of the Buy American Act are inapplicable if articles, materials, or supplies of the class or kind to be used are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities or are not of satisfactory quality.[63]

In addition to being manufactured in the United States, manufactured articles must be "substantially all" from articles, materials, or supplies mined, produced, or manufactured in the United States.[64] This requirement has the effect of making the obligation to use American resources the "mined or produced requirement," leaving the question open and unanswered as to exactly what "substantially all" was intended to mean. The Comptroller General went so far as to interpret this criteria as one requiring the use of a domestic product if it was reasonably available.[65] However, this problem was laid to rest with the promulgation of the Executive Order of 1954.[66]

The Comptroller General had stated that the Act of 1933 did not apply to articles manufactured abroad from material not available in the United States.[67] In 1949 Congress, in an attempt to bolster the domestic protection of the Act, amended the Act of 1933 with the specific legislative purpose of emasculating these Comptroller General decisions.[68]

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61 *Id.*

62 *Id.*

63 COMP. GEN. DEC. B-152975 (Dec. 17, 1963) [Unpublished]. The Comptroller General has held that determinations of sufficient and reasonably available commercial quantities of a material and determinations of satisfactory quality of a material are factual resolutions to be made by an agency head.

64 *Act of* 1933, supra note 31.

65 30 COMP. GEN. 384 (1951).

66 Executive Order 10592, 19 Fed. Reg. 8723, 41 U.S.C. § 10 (1933).

67 Reynolds and Phillips, *supra* note 27, at 220.

68 "An Act" of October 29, 1949, ch. 787, tit. VI, § 633, 63 Stat. 1024. The Act provides as follows:

> This Act shall be regarded as requiring the purchase, for public use within the United States, of articles, materials, or supplies manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality, unless the head of the department or independent establishment concerned

In 1953, the mass media started to call for repeal of the Act, spurred by what they felt were harsh and unjust practices; it was in 1953 that a British manufacturer, the low bidder for electrical generators for the Chief Joseph Dam, was disqualified under the terms of the Act and the contract awarded to a domestic manufacturer at a substantially higher price. Newspapers on both sides of the Atlantic called for a repeal of the Act.[69] Foreign nations became agitated because of a conflict between the Act's effect on international trade and the central theme of the United States' international trade policies.[70]

Those opposed to the Act felt that it was an embarrassment to the United States' international position as leader of the post-war movement to reduce all significant trade barriers in the furtherance of world trade. This position was, however, advocated by the United States in the preliminary drafting of the General Agreement on Tariffs and Trade but was rejected by those European countries who viewed this move as a means by which the "great American industrial machine" could further increase its pre-war dominance over the Continent.[71] The *Wall Street Journal* continued the attack on the Buy American policy stating:

> [T]he Government should [not] pretend to a competitive bidding policy and then squeeze out the low bidder just because it is a foreign firm. . . .
>
> We made what is, presumably, a bona fide request for bids. A foreign firm makes a bona fide bid that is the lowest of the lot. But come award day the foreign entry finds he's playing under a movable handicap.
>
> This newspaper has never thought that a protectionist policy was in the long run a wise one. But if we are going to have one, let it at least be forthright.[72]

A second major area of discontent with the Act, other than the imposition of a restrictive trade practice, was the excessive cost of domestic products when conipared with the cost of similar foreign products. Opponents of the Act were pointing out that the government was stressing economy on one hand, and allowing the

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shall determine their purchase to be inconsistent with the public interest or their cost to be unreasonable.

69 Knapp, ***szrpra*** note 30 at 436:

In the years following 1945, national trade barriers began to fall, largely at American instigation, and an Atlantic community of interests was conceived and implemented. The **Buy** American Act became, for a time, an anachronism and an embarrassing legacy to post-war administrations.

Baram, *Buy American*, 7 B. C. Isd. & Com. L. Rev. 269, 271 (1966).

70 *Id.*

71 John H. Jackson, World Trade and The Law of Gatt 290 (1969).

72 Wall Street Journal, Aug. 31, 1955, at 6, col. 1.

taxpayer to "foot the excessive costs" of the Buy American Act on the other.[73]

In response to the growing gap in the United States between the protectionists and the trade liberals, President Eisenhower commissioned several committees to study the situation. The Gray report found the Buy American principle in direct conflict with the basic foreign economic policies of the United States.[74] Like the Gray report, the Bell report noted that, "Buy American restrictions result in higher Government costs and establish a 'super tariff' on goods used by the Government." [75]

In January of 1954, the Randall Commission recommended across the board liberalization of the United States trade policies, condemning the Buy American Act in concept and consequence.[76] The report went on to propose that the application of the Buy American Act be suspended by reciprocal agreement with other nations and, pending modification of the Act by Congress, the President instruct the procurement departments to treat foreign bids on substantially the same price basis as domestic bids.[77] The Committee based its recommendations, in part, on its determination that the Buy American policy was costing the United States government up to $100,000,000 annually in higher prices, and another $100,000,000 in foregone customs revenues.[78] A minority report pointed to the important corollary effect of the Act—insuring that the United States has basic industries and services essential in both peace and war—"[T]his corollary effect, resulting from the Buy American Act, should be recognized as an essential goal and function of any new policy." [79] The minority report continued, "[a]lready the administration of this Act has emasculated it and prevented it from accomplishing its objective. The Act should now be applied to protect the industrial basis essential to national security and sound economy of the United States." [80]

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[73] Knapp, ***supra*** note 32.

[74] REPORT TO THE PRESIDENT ON FOREIGN ECONOMIC POLICIES 84, 81st Cong., 2d Sess. (1950).

[75] PUBLIC ADVISORY BOARD FOR MUTUAL SECURITY, A TRADE AND TARIFF POLICY IN THE NATIONAL INTEREST, 5, 83d Cong., 1st Sess. (1953).

[76] Knapp, ***supra*** note 30, at 434.

[77] **Id.**

[78] COMMISSION ON FOREIGN ECONOMIC POLICY, REPORT TO THE PRESIDENT AND THE CONGRESS, H.R. Doc. No. 220, 83d Cong., 2d Sess. 315-318 (1954).

[79] *Id.* at 19.

[80] **Id.** at 8.

III. EXECUTIVE ORDER 10582

On the 17th of December 1954, President Eisenhower promulgated Executive Order 10582.[81] The press release accompanying the promulgation stated that the Order was designed to bring about the greatest possible uniformity among the governmental agencies applying the basic legislation;[82] previously, the imprecise language of the Buy American Act made administrative interpretations difficult, permitting the procuring agencies to adopt and reject policies at their own discretion.[83]

The two most significant features of the Executive Order are (1) the fifty percent test used to distinguish foreign materials from domestic materials and (2) the six and ten percent cost differentials used to determine what constitutes unreasonable domestic material costs.[84] The fifty percent test defines a manufactured article of foreign origin as one in which the cost of the foreign materials used constitutes fifty percent or more of the cost of all materials used in the article. The differentials test provides that the offered price of articles of domestic origin shall be deemed to be unreasonable, or the acquisition of such articles inconsistent with the public interest, if the offered price exceeds (1) the offered price of like articles of foreign origin and a differential of six percent of the foreign offer, inclusive of duty and transportation costs, or (2) ten percent of the foreign offer exclusive of duty and domestic transportation costs, whichever is greater.[85]

The Executive Order consists of five sections, the first of which is a definitional paragraph: Materials are defined as articles and supplies; Executive agency includes executive department, independent establishments, and other instrumentalities of the executive branch of the Government; the term bid or offered price as applied to materials of foreign origin is defined as the bid or offered price of the materials delivered at the destination specified in the bid invitation. inclusive of applicable duties and all other costs incurred after arrival in the United States.[86]

Prior to the Executive Order, the criterion used to determine whether or not an item was of foreign or domestic origin was a

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81 Executive Order *So.* 10582, *supra* note 66.

82 Press Release of James C. Hagerty, ref. Executive Order *So.* 10582 (Dec. 17, 1954).

83 Watkins, *supra* note *26,* at 191-192.

84 *Id.*

85 Reynolds and Phillips, *supra* note *27,* at 220-221.

86 Executive Order No. 10582, *supra* note *66.*

25 percent test.[87] The Executive Order provided that material will be treated as foreign if the cost of the foreign components of that material aggregated fifty percent or more of the total component cost of the material.[88]

There has been a great deal of misunderstanding between contractors and Federal procurement officials in determining what constitutes a component and what constitutes an end product. In applying the fifty percent test, this differentiation becomes significant because only the actual physical-component costs of the end product are evaluated in determining whether the end product is of foreign or domestic origin for the purposes of application of the Act.[89] The Comptroller General has stated that "[t]he sole requirement to be a component is direct incorporation into the end product," [90] therefore, only the end product and its components, materials *directly* incorporated into the end product, shall be considered in determining whether an article is to be regarded as a foreign or domestic product. Thus, elements of labor, freight, profit, overhead, and packaging, while included in the price of the manufactured articles, are not to be considered as components of the end product, and the cost of such items must be excluded from the determination of whether the article is foreign or domestic.[91] The Comptroller General has further determined that factors such as the cost of bottles, bottle caps, analysis, and manufacturing are not to be included in the determination of whether the domestic costs exceed fifty percent of the cost of the end product.[92]

Simply stated, a firm that bids on an end product whose components are at least fifty percent domestic may bid as a domestic bidder.[93] Thus, a contractor whose end product consisted of fifty-one and one-tenth percent domestic components was properly consid-

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87 **Supplies shall be considered manufactured "substantially all" from United States supplies whenever the cost of foreign supplies used in such manufacture constitutes 25 percent or less of the cost of all supplies used in such manufacture. . . . Any supplies of an unknown origin used in such manufacture shall be considered to be foreign supplies.**

ASPR 6-103.2 (revised Sept. **17, 1954);** compare **41** U.S.C. App. 53.31 **(1952).**

88 Executive Order No. **10582,** ***supra*** note 66.

89 **Watkins,** ***supra*** note **26** at **200-201.**

90 **47** COMP. GEN. **21 (1967).**

91 COMP. GEN. DEC. B-166786 (June **24, 1969)** [Unpublished]; COMP. GEN. DEC. **B-163684 (May 1, 1968)** [Unpublished].

92 COMP. GEN. DEC. B-163684 **(May 1, 1968).**

93 COMP. GEN. DEC. B-154478 (July **7, 1964)** [Unpublished].

ered a domestic bidder." Likewise, where the bidder produced one component in his own plant, and the cost of this was greater than the sum of all other components, the end product was properly evaluated as a domestic article.'" However, when a bidder merely stated that most of the components of his end product were of foreign origin and failed to specify that the cost of the domestic components was greater than fifty- percent of the total cost of the end product, the bid was considered as offering a foreign item.[96]

In one case, a contract for nails, the Comptroller General determined that where there was only one component, steel wire, the steel mire must have been mined, produced, or manufactured within the United States or the end product would be considered as a foreign product, notwithstanding the fact that the wire had to be cut, a manufacturing process, within the United States."; The Comptroller General has also held that fittings for an acid waste drainage system procured in England in their complete and final form were not components within the meaning of the Buy American Act, but rather were foreign products.[98]

Under present regulations, the corporate status of a firm is not a factor to be considered in determining whether a bid or proposal should be treated as foreign or domestic. The Buy Xmerican Act and the criteria of the implementing regulations are complied with if the end product is manufactured in the United States from components substantially all of which are domestically manufactured. Neither the *siege sociale* of the firm nor the nationality of its stockholders is material for the purpose of this Act.[99] Likewise, no preference is given to a bidder who proposes to offer or supply an all-domestic article over one who offers an article composed of substantially all domestic components. As long as the fifty percent test is met, all bidders within this category are treated equally.[100] Section 2(a) of the Executive Order has thus solved one area of confusion in the original Act of 1933—what was meant by "substantially all" from United States materials.[101]

Section 2(b) deals with the determination of unreasonable costs

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94 COMP. GEN. DEC. B-170659 (Nov. 9, 1964) [Unpublished!.
95 50 COMP. GEN. 699 (1971).
96 COMP. GEN. DEC. B-170600 (Dec. 11, 1970) [Unpublishedl.
97 COMP. GEN. DEC. B-154501 (Aug. 11, 1964) [Unpublished].
98 COMP. GEN. DEC. B-162930 (Dec. 18, 1967) [Unpublishedl.
99 COMP. GEN. DEC. B-163684 (May 1, 1968) [Unpublished].
100 42 COMP. GEN. 467 (1963).
101 $1 COMP. GEN. 339 (1961).

of domestic end products. The Executive Order contemplated that a determination of the unreasonableness of the cost of a domestic item would not be made until after the receipt of all offers, foreign and domestic, and the comparison of prices, thus preventing any predetermined exclusion of possible bidders.[102] The mere fact that the price for domestic supplies is higher than those proposed for foreign end products, plus differentials, does not make the domestic cost unreasonable.[103] For domestic prices to be treated as unreasonable, the procuring agency must make a determination specifically stating that the cost is unreasonable; this determination need only be made when the foreign item is to be purchased. Absent this agency determination, the domestic cost is not "unreasonable." [104]

Section 2(c) sets forth those price differentials that were lacking in the Act of 1933 under which the several agencies were to evaluate their offeror's proposals.[105]

Section 3 of the Executive Order lists four exceptions to the guidelines laid down in Section 2. Specifically,

> [p]rocurement agencies may, however, accept a domestic bid exceeding the six percent differential (a) for reasons of national interest [§ 3(a)], (b) to assist domestic small business firms [§ 3(b)], (c) to promote production in an area of substantial unemployment [§ 3(c)], (d) to protect essential national security interests [§ 3(d)], or (e) whenever the head of the agency considers the domestic price reasonable, or production in the public interest [§ 5].[106]

Section 3(a) permits the executive agency "to reject any bid or offer for reasons of the national interest not described or referred to in this order." [107] This provision has been deemed a "catch-all" provision designed to meet unforseeable situations.[108] Although the section grants the executive agency broad powers of rejection, the Comptroller General has determined that this section does not confer on executive agencies the additional authority to favor an unreasonably high domestic bid over a much lower foreign bid.[109] When the head of a procuring agency makes a national interest determination under this section, he may indicate that certain factors,

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102 48 COMP. GEN. 487 (1969).

103 COMP. GEN. DEC. B-152469 (Dec. 10, 1963) [Unpublished].

104 COMP. GEN. DEC. B-151382 (Jul. 12, 1963) [Unpublished].

105 See text accompanying notes 93-94, *supra*.

106 Knapp, *supra* note 30, at 439.

107 Executive Order No. 10582, *supra* note 66.

108 Knapp, *supra* note 30, at 440.

109 42 COMP. GEN. 467 (1963). However, section 5 does.

other than price, will take precedence in evaluating the proposals. Other factors that may lawfully be considered are the American industrial situation, the deprivation of tas revenue. and the adverse affect on the monetary trade balance.[110]

Section 3(a) is particularly significant in the defense industry where it is in the nation's interest to keep defense contractors operating viably:

> Defense procurement is characterized by rapid changes in demand resulting from technological change or exogenous forces. Technological changes lead to a great deal of uncertainty in individual programs.[111]

> Technological change is rapid, the market can grow rapidly and contract rapidly as programs are cut back and terminated. Shifts in defense demand are sudden and sometimes almost capricious.[112]

The rapid rate of fluctuation and change in the defense industry highlights the necessity and importance of the section 3(a) exception.

Sections 3(b) and 3(c) are intended to assist small businesses and help alleviate the problem of a surplus labor community respectively.

Under section 3(b), a small business[113] is provided an evaluation preference. The differentials used in evaluation, section 2(c), are set aside and a third differential of twelve percent is used,[114] giving the small business an advantage over large business competitors. In order to be eligible, however, the small business must be offering a product of its own manufacture or a product that has been manufactured by another small business enterprise. If the small business offers a product nianufactured by a large business, the preference is not applicable; the bidder is considered a large business for the purposes of the procurement.[115]

In issuing the Executive Order, the President announced that he had made a determination that it was in the national interest to give preference to domestic low bidders who produce substantially all of the materials contracted for in a labor surplus area.[116] Thus,

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110 39 COMP. GEN. 760 (1960).

111 Moore, *Efficiency and Public Policy in Defense Procurement*, 29 LAW AND CONTEMP. PROB. 1, 5 (1964).

112 *Id.* at 6.

113 15 U.S.C. § 633 (1970). In the same section, a small business concern is defined generally as "one which is independently owned and operated and which is not dominant in its field of operation."

114 Watkins, ***supra*** note 26, at 192.

115 COMP. GEN. DEC. B-164396 (Aug. 5, 1968) [Unpublishedl.

116 A labor surplus area is one that is so designated by the Secretary of Labor

section 3(c) of the Order contains an evaluation preference for bids submitted by firms operating in labor surplus areas[117] and for those bidders who designate in their bid that they will employ firms operating in a labor surplus area, even though the specific area is not designated until after bid opening.[118]

On April 7, 1955, the President designated the Director of the Office of Defense Mobilization to render "national security advice under section 3(d) of the Order." The President instructed the Director that national security exceptions should be made only upon a clear showing that the payment of a greater differential than provided for in the Order is justified by considerations of national security.[119] In considering each individual case, the Director may obtain facts and views from his own staff, from other executive agencies or departments, from the contending bidders, from field investigations, and otherwise explore the matter.[120] The Director has stated that although he must proceed on a case by case basis, in light of the importance of the domestic industry's skills and tools, the impact of imports on further development in the industry would be kept under close scrutiny by his office and its advisory interagency task force.[121]

The '(national interest" exception to the Order has been invoked only once, to reject a low foreign bidder because a Communist-controlled union represented the foreign bidder's production workers at the time of award.[122]

Pursuant to Executive Order 11051, the Office of Emergency Planning, now the Office of Emergency Preparedness, was given the responsibility for providing Federal agencies with advice concerning the rejection of foreign materials for national security reasons.[123] The Comptroller General has held that under section 3(d) he does not have the authority to review or overrule an executive determination made by the procuring agency, upon the

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as containing six percent or more of the labor force unemployed. Knapp, ***supra*** note 30, at 441.

117 Watkins, ***supra*** note 26, at 192.

118 COMP. GEN. DEC. B-131576 (Mar. 19, 1958) [Unpublished].

119 White House Press Release (April 7, 1955). See, Public Papers of the Presidents of the United States, Dwight D. Eisenhower, 385 (1955).

120 Knapp, ***supra*** note 30, at 443.

121 *Id.* at 443-444.

122 Department of the Interior Release (Sept. 26, 1956) reference National interest exception contained in Executive Order No. 10582 § 3(d).

123 Watkins, ***supra*** note 26, at 193.

advice of the Office of Emergency Preparedness, that the agency reject a bid on the ground of essential national security interests.[124]

Section 5, like section 3(a), is a catch-all for all unforeseen situations. Section 5 provides that the differentials specified in section 2(c) will not be applied when the head of an executive agency determines that greater differentials than those specified therein shall be used.[125] Once a determination to use a greater differential than that provided in the Esecutive Order has been made, the provisions of the Act of 1933 become operative. Only domestic supplies shall be acquired for the public use unless the head of the department concerned determines their cost to be unreasonable.[126] The determination to use a greater differential than that provided in the Order is, of course, discretionary[127] and the Comptroller General has assumed a hands-off posture where the exercise of Esecutive discretion was clear and forthright.[128]

IV. ARMED SERVICES PROCUREMENT REGULATIONS

Section 4 of the Esecutive Order directs the head of each executive agency to issue those regulations deemed necessary to insure that procurement practices of his agency conform to the provisions of the Order.[129] Pursuant to this instruction, the Secretary of Defense incorporated in the Armed Services Procurement Regulations certain provisions governing the procurement of articles subject to the Buy American Act directives.

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124 41 COMP. GEN. 339 (1961).

125 Reynolds and Phillips, *supra* note 27, at 221.

126 COMP. GEN. DEC. B-152469 (Dec. 10, 1969) [Unpublished].

127 42 COMP. GEN. 608 (1963).

128 *Id.* It was under this section of the Executive Order that the Deputy Secretary of Defense, Cyrus Vance, issued the following directive, dated March 1961:

> In view of the recent decision of the Cabinet Committee on Balance of Payments and pursuant to the provisions of Executive Order 10582, my memorandum of August 11, 1962, ASPR and the appropriate contract provisions should be revised to inform prospective contractors that, as part of the current DOD Balance of Payments Program, a 50% differential (exclusive of duty) will be applied in evaluating bids on contracts for supplies under the Buy American Act. This differential will be applied in all cases to which the normal 6%-12% differentials (inclusive of duty) are applied under current ASPR. In view of the duty factor, it will be necessary to provide for application of both differentials.

Memorandum from Cyrus Vance to Assistant Secretary of Defense (I & L), March 7, 1964.

129 Executive Order No. 10582, *supra* note 66.

The Armed Services Procurement Regulations[130] were promulgated under the auspices of the Armed Services Procurement Act of 1947[131] to prescribe regulations for the procurement of defense related items.[132] The ASPRs were amended in 1952

> . . . to reduce radically the restrictive effects of the Buy American Act on Armed Services procurement. Every procurement contract exceeding $25,000 on which a foreign supplier was the low bidder was to be submitted to the appropriate service secretary. An accompanying unpublished memorandum of June 19, 1952, from the then Under-Secretary of Defense, the so-called "Foster Memorandum," requesting the secretaries of the service departments, with whom procurement authority rests, to ignore price differentials and to consider "competitive bids from sources in the United States and friendly foreign countries . . . on a common basis." [133]

As a result of the Executive Order of 1954, however, this policy was set aside and the Buy American principles were again grafted on to the Regulations.

Section 6-001(d) defines what constitutes a United States "end product" and this same definition is carried forward into section 6-101(a) and the remainder of the Buy American subchapter.[134] It would be more appropriate to say the section attempts to define, for the confusion within the procurement field as to what is an end product is far from being definitized:[135]

> Insofar as acquisition of manufactured end products is concerned, the Act requires not only that substantially all of their materials be of domestic origin, but also that they be "manufactured" in the United States. Neither the Act, nor the Executive Order, nor implementing regulations define the term. The Comptroller General has held, however, that the term should be construed in its broadest sense, to include the mere act of assembly of components, and has rejected the narrower approach of limiting the term to those instances where a substantial transformation of the article occurs.[136]

However, the Comptroller General narrowed his broad approach in 1969 when he determined that basic cylinder liner forgings purchased from Japan were deemed "end products," even though the

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130 Hereinafter referred to as ASPR.

131 10 U.S.C. §§ 2301-23M (1964).

132 The regulations are applicable to the United States as well as the Virgin Islands, Canal Zone, American Samoa, Guam, Wake Island, Midway Island, Guantanamo Bay, Swan Islands, and Johnston Island. The Pacific Trust Territories and occupied Japanese Islands are specifically excluded. 32 C.F.R. § 6.001(c) (1972).

133 Knapp, ***supra*** note 30, at 434.

134 32 C.F.R. § 6.101(a) et seq (1972).

135 Speck, ***supra*** note 50, at 3.

136 Reynolds and Phillips, ***supra*** note 27, at 223-224.

United States manufacturer processed these rough castings into the finished product by honeboring, chromeplating, and machining,[137] processes substantially more intricate than merely cutting imported wire for nails or putting lime into buckets.[138]

Another approach taken to eliminate the confusion in this area has been the "award theory":

> Although it would seem that what constitutes an end product could thus be determined on the basis of whether single or multiple awards are contemplated under a solicitation (the theory being that if the items are severable in the solicitation, they are end products), the Comptroller General has held that the fact that a single contract is to he awarded is not determinative of the question whether all items in a solicitation constitute an end product.[139]

In the same opinion, the Comptroller General went on to say that "there is no single answer to the question of what constitutes an end product.''[140] The purpose of a procurement had some effect, for it classified the item to be delivered and upon this wealth of information a determination could be made exercising sound procurement judgment.[141] What this meant, after the blanket rejection of the "award theory," was confusing. Most certainly, the line item designated in the contract for the particular item in question would, or should, be fairly indicative of what the end product of the particular procurement happens to be. If the contract was for components of a larger, more complicated article, previous decisions have indicated that even though these parts are but a portion of the larger item that will most likely be assembled and/or manufactured in the United States, they are end products for purposes of the Buy American Act. Although the principle may not be to the liking of the General Accounting Office, as evidenced by their burial and resurrection of the theory in the same decision, it does appear to be based on a logical and sound approach in light of the Act's history.

In April of 1972, the Executive Director, Procurement and Production, Defense Supply Agency, issued a directive on "Interpretation of 'Domestic End Product'."[142] After noting the definitive

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137 48 COMP. GEN. 727 (1969).

138 See text at notes 55-59 *supra*.

139 Reynolds and Phillips, ***supra*** note *27*, at 223.

140 48 COMP. GES. 384 (1968).

141 *Id.*

142 Letter from Brig. Gen. A. L. Esposito, Executive Director Procurement and Production to Defense Supply Agency Activities, 14 April 1972.

language of ASPR 6-101(a), the directive stated that where both foreign and domestic items are offered, each line item, as distinguished from the bid as a whole, must be separately evaluated as an end product in determining compliance with the 50 percent test of the Executive Order.[143] The directive also stated that where there are multiple purchases, each "separate unit of the item which is niechanically complete and independently useable will also be considered an end product." [144]

This strawman type problem appears to make a great deal about nothing.[145] A strict reading of the Executive Order of 1954 which stated that a product is made "substantially all" from domestic items if fifty percent or more of the components thereof are mined, produced, or manufactured in the United States,[146] would appear to settle the question. What the solicitation is seeking is the end product of that solicitation. This is the same whether the agency is procuring any multiple of the desired item or several components of a larger unit.[147] An examination of the original implementing legislation settles this "quandary" in a definitive manner.

In 1970, the Defense Personnel Support Center, Defense Supply Agency, Philadelphia, issued an invitation for bids requesting surgical blades of either carbon steel or stainless steel, neither type being specificallv preferred in the solicitation. The bidders offered only blades made of foreign stainless steel and the contracting officer

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143 *Id.*

144 Unfortunately, this announcement did nothing to relieve the problem, for the Comptroller General had made the same determination some four years earlier. *But* see, **47 COMP. GEN. 676 (1968).**

145 See *e.g.*, **47 COMP. GEN. 21 (1967).**

146 Executive Order No. **10582,** *supra* note **66.**

147 For example ordering separate components of an automobile engine in one solicitation with each component being assigned a separate line number. The use of computers in procurement situations htlps to explain this point. Today, an item solicited must be given a line number that will identify that item for that solicitation in the computer; if it is an item that is to be procured, it must have a line number. Thus, using the above rationalization, if the item has a line number, **it** would be the subject of the solicitation and thus an end product. A line number will not be given to a component when that component is to be part of an end item. Because that component will not be separately solicited, the end item will be the subject of the solicitation and only that end item will be given the computerized line number. Using the automobile engine example, **if** each separate component were to be solicited, each would be given a line number distinguishing that part from every other part and thus making it an end item. Whereas, if the entire engine were to be purchased as a complete entity, the complete engine only would be given the computerized line number.

made a determination of nonavailability of a domestic product awarding the contract for the foreign item under the exception to the Buy American Act listed in ASPR 6-103.2.[148] A protest followed the award and the Comptroller General held that

> [a] procedure that invites bidders and offerors to furnish surgical steel blades made from either domestic carbon steel or imported stainless steel without indicating preference, leaving the determination of the availability of domestic steel to bidders or offerors, is a defective procedure as the composition of the steel selected for the end product is, under the definition in paragraph 6-001 of the Armed Services Procurement Regulation, a component of the end product and subject to the restrictions of the Buy American Act, 41 U.S.C. 10 A-D. Therefore, when carbon steel is available. the restriction of the Act may not be waived for a product manufactured in the United States from foreign steel. Furthermore, a determination to exempt an item from the restrictions of the Act must, in accordance with ASPR 6-103.2(A), be included in the solicitation.[149]

In response to this decision, Mr. Anthony C. Crea. then Assistant Counsel, Defense Personnel Support Center, Defense Supply Agency, requested action from the legal staff, Defense Supply Agency, to modify the Armed Services Procurement Regulations to comply with the practical aspects of the procurement market. Mr. Crea wrote:

> In numerous instances domestic suppliers of specification items (particularly medical items) find themselves unable to compete with foreign manufactured items and drop out of the bidding. This leaves the foreign item as the only hid, and calls for a determination of nonavailability. The XSPR requires that prior to award of the foreign item, consideration will be given, in those cases, to foregoing the procurement or to providing a domestic substitute.
>
> It is a technical untruth to say that there is not a domestic substitute available. The reason it is unavailable is because of unreasonableness of price—and this is technically not availability for use because the domestic firm does not make an offer. The procuring activity feels that the mere fact that a domestic firm refuses to make offers in a losing cause should not obscure the fact that the foreign item is being bought on an unreasonable domestic price basis.[150]

As a result of the above mentioned protest and Mr. Crea's letter, ASPR CASE 73-32 was created, attempting to solve this problem.

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[148] 32 C.F.R. § 6.103-2 (1972).

[149] 50 COMP. GET. 239 (1970).

[150] Memorandum for the Record by John M. Brady, ref. ASPR Case 72-32, 4 October 1972.

The Defense Supply Agency Legal Member to the ASPR Committee proposed that, "ASPR be changed to permit determination of nonavailability, for end items or components, on a case-by-case basis by the Contracting Officer or as otherwise designated by the departments." [151] On July 28, **1972,** the Office of the Secretary of Defense concurred in the proposed change to ASPR 6-103.2(a) and (b)[152] and, on the 18th of October, the Defense Supply Agency issued the revised ASPR sections 6-103.2(a) and (b) that permitted the determination of nonavailability to be made subsequent to the issuance of the solicitation.[153]

In this respect, the ASPR Committee has taken a necessary step toward implementing the original purpose of the Buy American Act. The Act's legislative history clearly indicates that attempts to exclude foreign purchases were unacceptable to Congress.[154] Congress did not intend to exclude all foreign bids, as the old XSPR sections would indicate, by prohibiting a determination of nonavailability after opening, but rather intended to create a preference for those domestic bidders who bid on a domestic end product.[155] Thus, it is immaterial when the Contracting Officer makes his determination of nonavailability. If there are no domestic bidders, even though a domestic firm may be capable of producing the desired product, the Act does not apply; if the Act is inapplicable to nonavailability determinations, post-opening determinations of nonavailabilitv would not be prejudicial to the domestic nonbidder. This policy does not allow the head of the agency to neglect solicitation from domestic sources as was the case where the Army sought a special camera and made **a** nonavailability determination without first checking the domestic industry.[156] Nor will it alter the previously made determination that when time is of the essence, a determination of nonavailability may be made if the domestic manufacturer can not produce the desired item within the necessary time period.[157] All this change does is bring the current pro-

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151 Memorandum from John M. Brady to Chairman, ASPR Committee (Sept. 8, 1972).

152 Letter from Office of the Secretary of Defense, **L.** J. Hauch, to Chairman, ASPR Committee (July 28, 1972).

153 Letter from Dale R. Babione, Executive Director Procurement and Production, to DCSC, DESC, DFSC, DGSC, DISC, DPSC. ATTS: Director, Procurement and Production (Oct. 18, 1972).

154 See **text** accompanying note 8, ***supra.***

155 COMP. GEN. DEC. B-166786 (June 24, 1969) [Unpublished].

156 **COMP.** GEN. DEC. B-153037 (May 11, 1964) [Unpublishedl.

157 COMP. GEN. DEC. B-161895 (Dec. **29,** 1967) [Unpublished].

curement practices in line with the original purpose of the Act, assisting those domestic bidders competing with nondomestic offerors of the same product. Congress did not intend, as the ASPR Committee concluded, to require that a solicitation be cancelled and resolicited because no domestic bidders responded to the invitation. Such an inference would be, and is, inconsistent with the Act's objective and the subsequent implementing legislation,

The Defense Supply Agency's Legal Member to the ASPR Committee has proposed another "perplexing" problem for solution. A procuring activity solicits bids for a certain product and no domestic bids are received for that end item. After opening and before award, however, a domestic manufacturer notifies the contracting officer that he can produce a product that will perform the task desired of the solicited item and will meet the majority of the specifications of the item sought. Essentially, the domestic manufacturer is offering an "or equal item." What should the contracting officer do? Should he cancel prior to award, make the award, or delay award until a technical evaluation has been completed? Or is the contracting officer compelled by the Buy American Act and the Procurement Regulations to cancel and resolicit the domestically manufactured item?

The answer lies in the basis of the government procurement system. The Government may only procure an item that meets the minimum needs of the Government, not one that exceeds those requirements. Thus, if a domestic bidder offers an item that, although "equal" for procurement purposes but technically inferior in some respect to the required product, the domestic product would not be within the acceptable level of quality necessary for the solicited product. If, on the other hand, the domestically produced item is adequate for the desired task, the rule requiring the purchase of the "most basic" item able to do the task would prevail; the contracting officer would be required to cancel and resolicit. If there were a true "or equal" situation, the Comptroller General's decision would control,[158] and the contracting officer would be forced to resolicit under an "or equal" basis. If there is sufficient competition on the domestically produced item, the new solicitation should be for the domestic item alone.

This solution may seem simplistic and was so deemed by the ASPR Committee Legal Member, but there is no need to further complicate the regulations. This is especially true when reversion

[158] COMP. GEN. DEC. B-153037 (May 11, 1964) [Unpublished]

to the basic foundations of the procurement process will adequately solve the problem. Far too often, particularly as regards the Buy American Act, solutions are sought by the enactment of additional legislation which only tends to further cloud a fundamental approach that would provide a solution in most problem areas. Although there might appear to be alternate solutions to the hypothetical by analogy to the denial of a protest after opening regarding a change in specification,[159] or to the submission of a bid after opening,[160] reliance on these solutions would be inconsistent with the congressional intent behind the Act. Although such qualification of the domestic offeror would be technically proper, such an action would defeat the preferential intent of the Buy American legislation. Granted, the two analogies would be effective and avoid any Buy American discussion, but their employment would bypass the issue and subvert the intent of the **1933** legislation.

The bidder is required to certify that the product he is offering in his proposal is a domestic item; if not, he must so indicate.[161] This is accomplished by means of the Buy American Certificate. Although the ASPR requires that the offeror complete this certificate, the Comptroller General has determined that a failure to do so does not render the offer nonresponsive. On the contrary, the bid is deemed responsive and there is a presumption that the offeror is offering a domestic item.[162] Thus, the inadvertent omission of the Buy American Certificate would not be sufficient to reject a bid as nonresponsive but because of the presumption the offeror may be subject to an unfavorable determination as to responsibility[163] if he has no intention of supplying a domestic end product or he does not have the ability to produce a domestic

159 32 C.F.R. § 2.407-9 (1972); COMP. GEN. DEC. B-167782 (Jan. 21, 1970) [Unpublished],

160 34 COMP. GEN. 150 (1954); 35 COMP. **GEN.** 426 (1956).

161 32 C.F.R. § 6.104-3 (1972).

162 COMP. GEN. DEC. B-157815 (Jan. 21 1966) [Unpublished]; COMP. GEN. DEC. B-150652 (Jul. 19, 1963) [Unpublished]; COMP. GEN. DEC. B-153899 (Sept. 24, 1964) [Unpublished]. The Comptroller General has determined that the Buy American Certificate does not go to responsiveness at all but rather only to the evaluation of the bid. COMP. GEN. DEC. B-165018 (Sept. 19, 1968) [Unpublished]; 48 COMP. GEN. 142 (1968). The Comptroller General supports this stand by noting that the general acceptance of the Buy American Certificate by contracting officials is proper since the offeror is legally obligated under the contract to furnish the government a domestic source end product, and compliance with that obligation is a matter of contract administration which has no validity in the contract award. 50 COMP. GEN. 699 (1971).

163 47 COMP. GEN. 624 (1968).

end product.[164] Once the contract is awarded for a domestic end product, the Government is estopped from paying if the contractor is unable to prove domestic origin.[165] Further, if the contractor is awarded a contract on a presumption of a domestic end product, he may not seek reimbursement for the additional cost of supplying that domestic end product even though he originally intended to offer a foreign end product.[166]

A different result was reached by the NASA Board of Contract Appeals who recently determined that once the Government has accepted the goods, it has no authority under the terms of the Buy American Clause or the contract itself to proceed against a contractor who had indicated that he would supply a domestic item and, in fact, provided an item of foreign manufacture.[167] This decision creates a situation where the contracting officer under the changes clause. prior to delivery, mav order the contractor to provide a domestic item instead of a fbreign item. Once delivery is made, however, the Government is without a contractual remedy.[168]

In an effort to circumvent these harsh rulings, offerors have attempted to modify the Buy American Certificate in order to create a presumption that a product of unknown origin shall be considered to be of domestic origin. However, the attempt proved fruitless and such a presumption was strictly disallowed.[169] An offeror is not permitted to change his classification from domestic to foreign or foreign to domestic after the bid opening; the Comptroller General has determined that the manipulation of the evaluation criteria would, in fact, be giving the offeror an option after opening to become eligible or ineligible for an award control to the statutory procurement requirements.[170]

Once the offerers have indicated the origins of their products, the bids may be evaluated pursuant to XSPR 6-104.4.[171] Domestic end products will be purchased unless the cost is deemed to be unreasonable or the purchase of such products is found to be inconsistent with the public interest.[172] The legislative history of the

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164 *Id.*
165 15 COMP. GEN. *776* (1936).
166 COMP. GEN. DEC. B-131638 (June 6, 1957) [Unpublished].
167 Southern Pipe and Supply Co. NASA 570-7.
168 *Id,*
169 18 COMP. GEN. 458 (1969).
170 40 COMP. GES. 668 (1961).
171 32 C.F.R. § 6.104-4 (1972).
172 See note 100, *supra* and accompanying text.

Buy American Act indicates that Congress intended that unreasonable cost determinations be made by comparing domestic bids with foreign bids, not by analyzing domestic bids apart from similar foreign bids.[173] Section 2(a) of the Executive Order of 1954[174] sets forth the parameters by which these evaluations are to be made, the six and twelve percent factors.[175] However, section five of the Executive Order provides that in making a determination of unreasonableness, the agency head is not bound by the price differentials specified in the Executive Order but has the right to consider a bid greater than the specified factors as reasonable.[176]

The Department of Defense prompted by the "gold flow" problem, deviated substantially from the six and twelve percent factors using instead a fifty percent differential.[177] The Department of Defense's adoption of the fifty percent differential in 1964[178] permitted the use of the six percent rate, which includes duty, or the fifty percent rate, which does not include duty, whichever gives the greater preference to domestic products.[179]

The real impact of this drastic increase in differential is felt when the procurement is expected to exceed 10,000 dollars, and both domestic and foreign products are available. In such a situation the cost of the foreign goods must be less than two-thirds the price of the domestic goods in order to be considered. As a result, few foreign firms can be expected to be awarded Department of Defense contracts for supplies or services.[180] This apparent injustice to the foreign bidder is not as unjust as it would appear. In comparison with the bidding procedures of the foreign offeror's home nation, the "unjust treatment" afforded in the United States may be just when compared to the treatment afforded domestic producers there.

This "enthusiasm" aimed at curbing the rising gold flow originated in the Office of the Secretary of Defense and was transmitted via departmental memorandum. This memorandum directed

> . . . **that procurement by the Department's contracting officers that will result in dollar expenditures outside the United States shall be held to an**

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173 COMP. GEN. DEC. B-139912 (Jul. 22, 1960) [Unpublished].

174 Executive Order No. 10582, supra note 66.

175 Id.

176 COMP. GEN. DEC. B-151382 (Jul. 12, 1963) [Unpublished].

177 Baram, *supra* note 69, at 274.

178 See text accompanying note 127 supra.

179 REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES 8, B-162222 (Dec. 9, 1971).

180 Baram, supra note 69, at 275.

absolute minimum, and may be made only in the following cases.

(1) Procurements required to be made pursuant to a treaty or executive agreement between governments;
(2) procurements estimated not to exceed $10,000 required by compelling emergencies;
(3) procurements estimated not to exceed $500;
(4) procurement of perishable substance items, and
(5) procurements as to which it is determined in advance that the requirements can only be filled by foreign supplies or services.[181]

When it is estimated that the price of goods delivered from domestic sources will not exceed $10,000, procurement will be restricted to domestic end products or services without regard to possible price differentials. Those procurements estimated to surpass rhe $10,000 figure shall be similarly restricted provided that the excess cost of the domestic product or service is estimated to be no more than fifty percent of the cost of the foreign product or services.[182]

The rationale for this action was based upon the desire of the United States to maintain a favorable balance of payments.[183] In more recent efforts to improve our balance of payments, the Office of Management and Budget has recommended that all Federal agencies follow the Department of Defense procedure. Likewise, the Comptroller General has placed his "seal of approval" on these measures, noting that such a policy has the effect of establishing Buy American restrictions without conferring Buy American privileges.[184]

Although favorable to domestic labor, this action is contrary to the legislative policy considerations which predicated the original legislation in 1933; 'legislation that intended to restrict buying to domestic items failed to pass. Instead, the resulting legislation specifically provided that foreign suppliers were to be considered and the only preferences to be afforded the domestic bidder were the price or evaluation differentials. The Executive Order further recognized that deviation from the differentials specified in section 2(c) of the Order by the agency head shifts the policy considerations from the Order to the original Act, and the terms of the Act govern."[185] It would appear that the Department of Defense failed

181 GOV'T. COST. REP, para. 80, 308.

182 Id.

183 REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES 8, B-162222 (Dec. 9, 1971).

184 COMP. GEN. DEC. B-153806 (May 20, 1964) [Unpublished].

185 Executive Order No. 10582, *supra* note 66.

to follow the 1933 Act: it did not provide open competitive bidding on a nondiscriminatory basis; and the instructions restricting the bidding to domestic firms entirely, no matter what the price level of the procurement, are violative of the provisions of the Buy American Act.

Since the 1962 Department of Defense memorandum other actions have been taken to boost sinking domestic industry. The Berry Amendment to the Act of 1933[186] modifies the Buy American provisions of nonexclusion of foreign products in favor of a total buy-national policy with respect to certain commodities such as food, clothing, cotton, woven silk, woven silk blends, spun silk yarn for cartridge cloth, or wool not grown, reprocessed, reused, or produced in the United States or its possessions.[187] Title IV of Public Law 92-204, applicable to shipping, states:

> That none of the funds herein provided for the construction of any naval vessel or conversion of any naval vessel to be constructed in shipyards in the United States shall be expended in foreign shipyards for the construction of major components of the hull or super structure of such vessel.[188]

One of the recently proposed modifications to the Act is House Resolution 10923. This Resolution provides that privately owned United States commercial flag vessels should carry governmentally generated cargoes to the greatest possible extent if there is no substantial difference in freight rates between United States flag and foreign flag vessels.[189] Although H.R. 10923 does retain the "unreasonable cost determination," it, along with the shipbuilding and Berry Amendments, reverts to the already rejected Buy American proposals advocating a buy-national policy at any cost. Contrary to the legislative history of the Act, this line of reasoning is not to be condemned; it was the intent of the Act to stimulate a faltering economy and help an unemployed labor force.

The Act as modified contains a national security exception intended to assist those industries that are financially troubled, yet are essential to our national security. Could the same objective have been obtained without the additional legislation? During the 92nd Congress nine pieces of legislation were introduced in the House at-

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186 Department of Defense Appropriations Act, 1972, Dec. 18, 1971, Pub. L. No. 92-204, 85 Stat. 716, amending 41 U.S.C. §§ 1-(a)-(d).

187 *Id.*

188 *Id.*

189 HOUSE COMMITTEE—MERCHANT MARINE AND FISHERIES, H.R. Doc. No. 1021, 91st Cong., 2d Sess. (1970).

tempting to modify the Buy American Act: one dealt with the general applicabilitv of the Act;[190] three proposed that States mav impose Buy American policies without encroaching or infringing upon the powers of the Federal Government in its regulation of the foreign commerce;[191] one proposed clarification of the Act's applicability with respect to the procurement of naval vessels and integral components;[192] one dealt with the use of domestic materials in the construction of United States highways;[193] one proposed that domestic items be used exclusively in Federally funded noise, air, and water pollution control programs;[194] and four proposed to establish a mandatory fifty percent differential defining an unreasonable domestic bid and that the cost of those components mined, produced, or manufactured in the United States be of a set percentage, up to 75 percent,[195] of the cost of the end item in order for that item to be considered an item of domestic origin.[196]

Finally, the Armed Services Procurement Regulations make exceptions for certain materials from the provisions of the Buy American Act as amended.[197] Section 6-105 of ASPR[198] lists those

190 H.R. 11161, 92d Cong., 2d Sess. (1972).

191 H.R. 976, 92 Cong., 2d Sess. (1972); H.R. 13282, 92d Cong., 2d Sess. (1972); H.R. 12905, 92d Cong., 2d Sess. (1972).

192 H.R. 10460, 92d Cong., 2d Sess. (1972).

193 H.R. 7147, 92d Cong., 2d Sess. (1972).

194 H.R. 13937, 92d Cong., 2d Sess. (1972).

195 H.R. 13283. 92d Cong., 2d Sess. (1972).

196 H.R. 11713, 92d Cong., 2d Sess. (1972); H.R. 12905, 92d Cong.. 2d Sess. (1972); H.R. 11010, 92d Cong., 2d Sess. (1972); H.R. 13283, 92d Cong.. 2d Sess. (1972).

197 32 C.F.R. § 6.103-5 (1972). Many of these exceptions apply to goods produced in Canada. The United States exempts certain Canadian articles of common defense from the restrictions of the Buy American Act 32 C.F.R. §§ 6.103-5 et seq. (1972), as does Canada with certain United States manufactured common defense items, 32 C.F.R. §§ 6.501 et seq. (1972). For articles not of the common defense type. price partiality for domestic goods has been established through custom. DAM, THE GATT, LAW ASD INTERNATIONAL ECONOMIC ORGANIZATION 205 (1970). Normally, the premium is said to be less than ten percent. However, a preference of more than ten percent may be authorized for certain types of goods produced by industries which are deemed necessary to maintain from a national defense point of view. OECO, ***infra*** note 249, at 23. Further, the Treasury Board, in determining what price preference the domestic product will hnve, will take into consideration the budget situation, the state of the economy, and Canada's foreign trade position. *Id.* Import duty and other charges are counted in when foreign bids are evaluated. In this respect, the application of Commonwealth customs favoritisms may make some difference between various foreign suppliers. *Id.*

198 Conversation with DSA Legal Member to ASPR Committee, John M. Brady. 16 Oct. 1972.

items that are exempt from the application of the Buy American Act. For an article to be placed on this list or removed, the approval of all Departmental Secretaries is required. The items on this list have been determined to be nonavailable at commercially reasonable levels in the United States. If a domestic concern were to begin to manufacture one of these excepted articles under the present system, it would receive no protection from the Buy American Act. One member of the ASPR Committee has proposed that the present language of 6-105 be amended to permit a semi-annual evaluation of the list by the ASPR Committee with the power to delete or add articles.[199] Although this proposal has not been acted upon, it seeks to reduce unnecessary delay and to protect the interests of the domestic producer in a more expeditious manner, a step in the right direction.[200] With the advent of this new proposal, the domestically produced goods will be protected by the Act at an earlier interval because of the Committee's closer contact with the field.

V. NONAPPLICABILITY OF BUY AMERICAN

The Act of 1933, as well as the Executive Order of 1954 were designed to accord preferential treatment to domestic producers and manufacturers when materials and supplies are purchased by Federal agencies. Certain exemptions from the Act's requirements were made. When the materials or supplies were for use outside the United States or the head of the department or agency concerned determined that (1) it would be inconsistent with the public interest or *(2)* the cost of domestic supplies or materials would be unreasonable if purchased from domestic producers or manufacturers, then purchase from domestic producers would not be required.[201] In light of this "public interest" exception, the Department of

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199 32 C.F.R. § 6.105 (1972).

200 Memo from John M. Brady to Chairman, ASPR Committee, Sept. 8, 1972.

201 Act of 1933, ***supra*** note 31. Section 6-103.1 of the Procurement Regulations succinctly states, "the restrictions of the Buy American Act do not apply to articles, materials, or supplies for use outside the United States." 37 C.F.R. § 6.103-1 (1972). The Comptroller General and the courts have held consistently that the Buy American Act does not apply to procurement of materials for use outside the United States nor does it apply to bases leased by the United States in foreign nations. COMP. GEN. DEC. B-161895 (Dec. 29, 1967) [Unpublishedl. United States v. Spelan, 338 US. 217 (1949); See ***also*** Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949).

Defense determined that it would be inconsistent with the public interest to apply the Act's restrictions to supplies determined to be of a military character or involved in programs of mutual interest to the United States and Canada;[202] a determination the Comptroller General has consistently upheld under the public interest exception to the Act.[203] Pursuant to a 1956 agreement between the Canadian Government and the Secretaries of the Army, Navy, and Air Force, this exception is incorporated into the Armed Services Procurement Regulations.[204]

In 1968, following Congressional authorization[205] an Executive Agreement was created between the Governments of Norway and the United States, effective through 1973;[206] since this agreement did not obligate appropriated funds, it was not a treaty requiring Senate approval.[207] The Agreement sets forth that:

> . . . The Department of Defense will search our potential Department of Defense requirements suitable for procurement from Sorwegian sources with the objective of procuring selected equipment and supplies in Norway through CY 1973. Such procurements will include selected defense items which: (I) satisfy Department of Defense requirements for performance, quality, and delivery and (II) cost the Department of Defense no more than would comparable U.S.-source Defense articles or foreign source Defense items eligible for procurement contract award. In inviting competitive bids from Norwegian sources for such selected defense items, the Department of Defense will evaluate such bids without imposing any differentials under the Buy American Act . . . and without taking applicable U.S. customs and duties into consideration so that Norwegian firms may better compete for the sale of such defense items to the Department of Defense with United States firms or foreign firms which are eligible for procurement contract awards.[208]

The Executive Agreement makes the Buy American Act evaluation preferences inapplicable to Norwegian goods, but it does not give a preference to Norwegian goods over other domestic or foreign items.

Unlike the Canadian exception, the Norwegian agreement was

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202 COMP. GEN. DEC. B-151898 (Aug. 22, 1962) [Unpublished]; COMP. GEN. DEC. B-150183 (Apr. 17, 1963) [Unpublished].

203 COMP. GEN. DEC. B-151898 (Aug. 22, 1963) [Unpublished].

204 31 Fed. Reg. 1016 (Jan. 27, 1966) as amended at 32 Fed. Reg. 5508 (Apr. 4, 1967).

205 Mutual Defense Assistance Act of 1919, 63 Stat. 711, § 402.

206 COMP. GEN. DEC. B-170026 (Dec. 14, 1970) [Unpublished].

207 COMP. GET. DEC. B-170026 (Dec. 14, 1970) [Unpublished], and U.S. CONST. arts. II § 2, I § 8, and IV.

208 COMP. GET. DEC. B-170026 (Dec. 14, 1970) [Unpublished].

created by an Executive Agreement pursuant to an Act of Congress.[209] Since an Executive Agreement has been deemed to bind the United States in the International Community as would a Treaty ratified by the Senate,[210] the United States would be subject to the same duties as it would under a treaty.[211]

VI. GENERAL AGREEMENT ON TARIFFS AND TRADE

The absence of international obligations operative on government procurement is becoming a serious problem. As government activity in some nations assumes a greater part of their national economic resources, governmental priority afforded to domestically produced goods is becoming a serious impediment to international trade and the allocation of world resources.[212] In an era when 25 to 40 percent of the gross national product of most countries passes through public budgets, discrimination against foreign products by governmental selective purchasing constitutes an important barrier to world trade from a purely quantitative point of view.[213]

In an effort to eliminate harboring of international resources, the General Agreement on Tariffs and Trade was promulgated.[214] Article I of the Agreement sets out the Most Favored Nation Clause —any advantage, favor, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be afforded to like products originating in or destined for the territories of all other contracting parties.[215] Article III obligates the contracting parties to avoid using internal govern-

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209 RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 120 (1965).

210 The Supreme Court recognized the right of the Executive to create these International Agreements in: B. Altman & Co. v. United States, 224 U.S. 583, (1912); United States v. Belmont, 301 US. 324 (1937); United States v. Pink, 315 US. 203 (1942). Further, Congress recognized this power and provided for the publication of these international agreements other than treaties to which the US. is a party by providing for their publication in the Statutes at Large, 52 Stat. 760, 1 U.S.C.A. § 30 (1938).

211 Lissitzyn, ***The Legal Status of Executive Agreements on Air Transportation***, 17 J. AIR L. AND COM. 436, 438-444 (1950).

212 JACKSON, WORLD TRADE AND THE LAW OF GATT, 299 (1969).

213 DAM, ***supra*** note 197, at 199.

214 *Id.* It was signed by the United States in 1947.

215 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (5), T.I.A.S. No. 1700, 55 U.S.T.S. 194 (1948) as amended. [hereinafter referred to as GATT]

mental measures for the protection of domestic production.[216] Specifically, paragraph 2 of Article III provides that:

> The products of the Territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any **kind** in excess of those applied, directly or indirectly, to like domestic products.[217]

This language was designed to prevent internal taxes from being applied discriminatively to import products, thus operating as effectively as a tariff in the protection of local products from foreign competition.[218] Without further examination, it would appear that Article III rendered the Buy American Act unlawful;[219] Article III, however, provides an exception for Government procurements.

The original draft of the Treaty proposed by the United States contained provisions requiring that in the case of Governmental purchases national treatment be extended to imported goods, thus bringing Government contracts within the scope of the Most Favored Nation Clause.[220] This policy, although rejected by the other parties to the negotiations, was in line with the prevalent anti-buy-national movement of the late 1940s. Article III(8) of the Treaty clearly provides that the provisions of Article III(4) requiring national treatment for imported products with respect to all laws, regulations, and requirements affecting internal sales, offerings for sale, transportation, distribution or use, does not apply to procurement by Government agencies of products for governmental functions.??' The State Department in interpreting the Treaty has determined that the Buy American Act, as amended, is consistent with this provision of the Treaty.[222]

The Treaty, like the Buy American Act, recognizes the motives for restrictions on government procurement; it classifies these stimuli into three primary categories: balance of payments, national security, and protection for local industry.'"' Article XII allows the contracting party to restrict the quality or value of merchan-

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216 JACKSON, *supra* note 212, at 279.

217 *Id.*

218 *Id.* at 279-280.

219 U. S. CONST. art. V.

220 JACKSON, *supra* note 212, at 290.

221 DAM, *supra* note 197, at 199-220.

222 Usher, *California's Buy-American Palicy: Conflict* ***with*** *GATT and the Constitution,* 17 STAN. L. **REV.** 119 (1964).

223 **DAM,** *supra* note 197, at 200.

dise to be imported, thus safeguarding the contracting partv's financial position and its balance of payments status.[224]

> Balance-of-payments motives play a large role in discrmination against foreign goods in the procurement context. Government purchasing criteria are viewed as important instruments of national policy. Governments that are fighting payment imbalances and are seeking to put their own houses in order before reducing private expenditures abroad find limitations on foreign procurement to be convenient and politically popular measures, despite the premium that must by definition be paid for domestic supplies.[225]

The Secretary of Defense's 1962 memorandum which sets forth more stringent evaluation differentials and purchasing criteria than set forth elsewhere would fall within this exception.[226]

One of the major escape possibilities from the Article III obligations is found in the general and security exceptions found in Articles XX and XXI.[227] Article XXI contains a broadly drafted, self-judging exception to the General Agreement dealing with all measures that a contracting party considers necessary for the protection of its essential security interests, relating to traffic in arms, ammunition and implements of war, and to such other materials sought directly or indirectly for the purpose of supplying the military establishment.[228] This exception has one danger: it is almost indefinitely expandable according to the contracting party's self-analysis of what is an essential material for the military establishment and what is a military establishment. One argument that could be made is that the civilian industry also supplies the military in time of national emergency and must be kept in a prepared status.[229] This reasoning has been urged as a defense of our own Buy American policy.[230] In fact, the national security justification for discrimination in government procurement is so great that it has become an inescapable fact of contemporary world politics.[231]

As large as military expenditures are and as important as balance-of-payments considerations may be, a major motive for procurement restraint is protection of domestic industry.[232] As is the case in the

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224 GATT, supra note 215, at Art. XII.
225 DAM, supra note 197, at 200.
226 *Id.* at 202.
227 JACKSON, *supra* note 212, at 287.
228 DAM, *supra* note 197, at 201.
229 *Id.*
230 See *supra* notes 111-112, and accompanying text.
231 DAM, supra note 197, at 201.
232 *Id.* at 202.

national security exception, no one seriously contests the necessity of a protectionist policy; it serves the purpose of providing another means of effectuating the Article III(8) governmental purchasing exception without over-burdening that one provision.[233]

It would thus appear that the amended Buy American Act would fall under one of the exceptions to the Most Favored Nations Clause of Article I. The Canadian exception would fit, with some loose ends protruding, under the umbrella of Article XXI's national security exception, military items mentioned in the Article or those essential to the military establishment; but the Norway Agreement does not seem to fit under any of the protectionist exceptions. The Norway Agreement, having the status of an international treaty binding on the parties, clearly gives the Norwegians a preference not afforded to other bidders except with regard to those items enumerated in ASPR Section 6-105 and which appear to fall squarely within the grasp of the Most Favored Nation Clause of Article I. If this interpretation holds true and the language of the Norway Agreement, that the preferential treatment only extends to Department of Defense selected items, is not sufficient to bring it under the protection and safety of Article XXI's blanket coverage, it is suggested that these international agreements cause the United States to be in violation of the General Agreement. It has been noted that:

> Although the basic [Most Favored Nation] Clause of Article I, paragraph 1, applies only to an enumerated list of GATT obligations, when taken together with the other GATT [Most Favored Nation] clauses (articles IV, para. (b); III, para. 7; V, paras. 2, 5 and 6, IX, para. 1; XIII, para. 1, XVII, para. 1; XVIII, para. 20; and XX, para. (j)) it is hard to find a GATT obligation that is not subject to the principle of nondiscrimination.[234]

VII. BUY NATIONAL POLICIES OF EUROPE, NORTH AMERICA, AND JAPAN

A. GENERAL PRINCIPLES

Although the United States and the Buy American Act have received the greatest international publicity, the United States is not the only country that pursues autarky in its procurement policies.[235] It has been stated that:

> We have been trying for a long time to get other countries through GATT and through OECD to agree with us on uniform procedures for govern-

233 *Id.* at 201.

234 JACKSON, *supra* note 212, at *270.*

235 DAM, *supra* note 197, at 203.

> ment procurement. We have the Buy American Act which spells out the range of preferences given to American producers as against foreign producers. The other countries have much less open processes of determining how their government procurement should take place. In many cases, it is impossible for an American company to bid on procurement by a government agency in a foreign country.[236]

Some countries other than the United States have adopted formal price preference rules. These preferences range up to 15 percent in Norway, 10 percent in South Africa, and 8 percent in Greece.[237] These preferences, however, are often applied after customs duties have been added to the foreign supplier's prices and where there are no formal differentials, customs duties are conveniently added to foreign bids in making awards.[238]

The most effective method for discriminating against foreign suppliers is through the discretion of procurement officials to select suppliers on the basis of criteria other than price. The absence of statutorily prescribed criteria permits the procurement officers to be more protectionist than they otherwise might be.[239] The United States requires that all bids be made public and that any unsuccessful bidder be given, upon request, an explanation of the basis of the award, a practice not followed in foreign nations. This permits public verification and control of the degrees of preferability accorded domestic suppliers.[240]

Unofficial and informal devices for restricting foreign competition are also employed. Other means accomplishing the same result are: selective tender procedures, in which invitations to bid are sent only to suppliers on a preestablished list; single tender procedures, in which the procuring authority contracts only with one supplier even though other suppliers can produce the desired item; substitution of negotiated contracts for public tenders; limited publicity on public offers; and requirements that bidders have branch establishments within the country.[241]

With these informal means of selecting domestic items in mind, this article will note the official procurement requirements for

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236 *Hearings on "A Foreign Economic Policy for the 1970s" Before the Joint Economics Committee,* 92d Cong., 1st Sess. pt. 7, at 1321 (1971).

237 111 CONG. REC. 58-62 (Memorandum by Joseph W. Marlow).

238 DAM, *supra* note 197, at 205.

239 *Id.* at 204.

240 *Id.* at 205.

241 *Id.* at 203.

Europe, North America, and Japan and their treatment of potential foreign suppliers. In order to undertake an informed esamination of European requirements, a brief look at the European Free Trade Association (EFTA)[242] and the European Economic Communitv's (EEC)[243] policy is appropriate.

B. EFTA AND EEC

At the 1966 meeting the EFTA Ministers decided that article 14 of the convention required that, as far as procurement was concerned, "public undertakings shall give equivalent treatment to domestic goods and other goods of EFTA origin and shall award contracts on the basis of commercial considerations.''[244] Not satisfied with this general statement, the ministers agreed:

> . . . that the member governments should take immediate steps to ensure that the relevant governmental agencies made adequate opportunities for bidding available to interested suppliers in the other member countries and to insure that bids were judged objectively. They further decided that the member countries should exchange lists containing such information as would be of particular interest to potential suppliers in other EFTA countries, . . .[245]

Thus, a strong buy-national policy is favored notwithstanding the mentioned and nonmentioned prbvisions of GATT condemning this type of conduct.[246]

The European Economic Communitv has a strong tendencv to purchase from nation-parties belonging to their organization. and thus to the detriment of those nations that are not parties to the Treaty of Rome. Like the EFTA, the EEC Commission has been attempting to negate procurement discrimination bv member states against contractors and suppliers from other member states. As a preliminary step, the Internal Market Committee has divided procurements into two categories: (1) public works contracts and (') supply contracts.""

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242 Hereinafter referred to as EFTA.

243 Hereinafter referred to as EEC.

244 EFTA Bulletin, Vol. VIII, No. 2, 2-3 (March-April 1967).

245 *Id.*

246 Most of the EFTX nations are parties to GXTT.

247 DAM, *supra* note 197, at 206. Like EFTA, however, those proposals set forth by the Committee have fallen on deaf ears and have gained little support.

C. EUROPEAN NATIONS

The European nations will be examined in alphabetical order.

1. Austria. Austria has three methods of procurement. For contracts involving amounts exceeding 300,000 Austrian shillings, the public discretionary tender procedure is employed.[248] The second procedure, adopted for purchases involving smaller amounts, is selective discretionary tender. In special circumstances, private contracts (sole source) may be used.[249] Austria has no special residency or registration requirements for firms desiring to bid for Government contracts,[250] but when the contract involves public works or roads, foreign bidders must have a subsidiary licensed to do business in Austria.[251] It has been stated that:

> [t]here are no regulations giving clearly defined preference to Austrian firms, but procuring officials have to take into account the administrative "ONORM" regulations. The text of Article 1, 34 of these is as follows: "If circumstances permit, only products of Austrian origin shall be used and only Austrian firms shall be engaged." The expression "if circumstances permit" means that in assessing bids, normal commercial considerations are the deciding factor.[252]

Normal import duties are applied to the evaluation of foreign bids except those of EFTA states.[253]

2. *Belgium* Belgian law does not impose any particular formal requirements on foreign suppliers although authorities may stipulate that certain special conditions must exist.[254] Under normal conditions, the lowest bidder will be awarded the contract but in certain exceptional cases, a waiver may be obtained from the Council of Ministers allowing purchase of domestic items, excluding the low foreign bidders within the limits of specified differentials. These waivers are granted for economic or industrial reasons.[255]

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248 Only a limited number of potential suppliers are invited to submit estimates to all buying departments, which then select the most favorable bidder.

249 OECD, GOVERNMENT PURCHASING IN EUROPE, NORTH AMERICA AND JAPAN, 11 (1966).

250 *Id.* at 12.

251 *Id.*

252 *Id.*

253 *Id.* at 13.

254 OECD, *supra* note 249, at 16. *Also* see Marlo Memorandum, *supra* note 237, at 19-20. Belgian domicile or in the case of a corporation, ⅔'s of ownership must be Belgian.

255 Marlo Memorandum, *supra* note 237, at 16-17.

Belgium does not add import duties to the evaluated price, but does require these duties to be paid.

3. *Denmark.* In Denmark, governmental departments are free to invite the tender of bids from foreign suppliers. There are no residence, registration, or other requirements in order for a firm to bid for government supplies.[256] Apart from certain old instructions of the 1920s and 1930s, which are no longer followed, although not officially repealed, there are no formal instructions or lists of suppliers issued to purchasing authorities in which partiality for Danish goods is compelled.[257] Goods manufactured by a Ministry of Defense enterprise and certain goods produced by prisoners for training purposes are, however, given preference by public authorities if they meet the needs of the purchasing agency.

In appraising a foreign bid, the purchasing agency will consider import duties as part of the bid price.[258]

4. France. The officially stated French policy is pragmatic. France announces that "in principle" foreign firms have the same opportunities as domestic firms "when tenders are invited."[259] There are, however, instances where restrictive provisions are applicable: the purchasing department in the acquisition of current supplies may unilaterally stipulate that only French suppliers are authorized to bid; industrial contracts may require the bidder to be of French nationality and to supply proof that he is able to perform the contract on French soil; and for reasons of national defense, contracts for armaments impose specific restrictions with regard to nationality, government supervision and licensing.[260] It is specifically provided that where the offer of domestic and foreign firms are basically equal in quality and price, the award should be given to the domestic firm.[261] France also has a bias toward products produced by French cooperatives or agricultural producers.[262]

In practice, the official position is not always followed, "[t]he chief purchasing officer of the French State Railways system stated . . . that foreign firms would not be seriously considered unless

256 OECD, *supra* note 249, at *26.*
257 *Id.* at *26-27.*
258 *Id.*
259 *Id.* at 32.
260 *Id.*
261 *Id.* at 33.
262 *Id.* at *32.*

their bids were 20 to 30 percent below the lowest French bid." [263] Even when open public tender procedures are followed, publicity and the length of notice can be manipulated to favor domestic suppliers. In France, open public tenders may be announced through the medium of posters, the *Bulletin Official des Announces des Marches Publics,* or trade journals.[264] Thus, the method of announcement and the time allotted for bid preparation could create a hardship for a foreign manufacturer.

5. Federal Republic of Germany. The Federal Republic of Germany imposes one condition upon bidders—the bidder be, "qualified, able to meet the request, and solvent." [265] It has been specifically decreed that foreign bids should be treated in the same manner as domestic bids of foreign made products.[266] In spite of this decree, domestic suppliers retain a preference because of their location. Germany has two-to-three week notice limits which are likely to exclude all but the largest and best organized firms.[267]

The Federal Republic has a partiality system, similar in operation to the United States' small business and labor surplus preference that is designed to benefit certain peoples expelled from the Soviet Union, distressed areas, victims of war, and victims of national socialist persecution and evacuees.[268]

It has also been said:

> The participation of foreign bidders in selective tenders depends on the nature and value of the services required and on whether the foreign products are better suited to the purposes envisaged than domestic products and whether they are cheaper. . .
> When deciding the award (on the basis of the "most economical bid') the customs duty and other duty leviable under the legislation are added to the price of the foreign bid, unless they have already been included in the price submitted.[269]

6. Greece. Greece allows foreign or domestic individuals or corporate bodies to tender bids on the condition that during the time the tender is submitted, they are engaged in appropriate industrial

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[263] Marlow Memorandum, *supra* note 237, at 24.
[264] DAM, *supra* note 197, at 204.
[265] OECD, *supra* note 249, at 27.
[266] *Id.*
[267] DAM, *supra* note 197, at 204.
[268] These favoritisms may range from 20 to 40 percent depending upon the size of the contract and the size of the business bidding.
[269] OECD, *supra* note 249, at 38.

activity either in Greece or abroad.')"' Additionally, all bidders must show that they have paid their Greek taxes.?" The Minister of Commerce may decide that only domestic suppliers may bid, but on all contracts in excess of $50,000, he must solicit foreign tenders.[272] By virtue of the Council of Ministers Act 163 of 1958, the Minister of Commerce has been given the responsibility to:

> . . . streamline Government purchases to countries with which Greece is linked by bilateral clearing agreements, with a view to absorbing possible surplus balances, or to creating available accounts in order to facilitate the export of Greek agricultural products.[273]

Foreign firms may be required to bid in association with a domestic firm when specialized equipment requiring specialized skill, staff and constant or periodic maintenance or attendance is involved.[274]

Under a Government contract, imported goods are normally exempt from import duties, unless the contract has provided otherwise. When the goods are produced by Greek industry, a domestic bid must contain an amount equal to the duty which would be payable for importation under the contract. This duty figure is the basis upon which the domestic preference, if any, is calculated.[275] This preference is normally eight percent, although up to thirty percent is permissible, and a 35 percent preference is the limit when dealing with Greek metal and metal-working industries.[276]

7. *Ireland.* Ireland prescribes no special requirements on firms desiring to bid for government contracts.[277] The lowest tender usually wins[278] and foreign firms are treated the same as domestic firms regarding the terms and the conditions imposed upon the bidders.

Subjecting some foreign made items to an import duty or an import quota restriction provides one form of preference for the domestic bidder. When the foreign items are of a nondutiable nature, a preference, the extent of which is confidential, is given to Irish firms.[279]

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270 *Id.* at 43.
271 *Id.*
272 *Id.*
273 *Id.* at 45.
274 *Id.*
275 ***Id.***
276 *Id.* at 45-46.
277 *Id.* at 49.
278 *Id.*
279 *Id.* at 50

8. *Italy.* Italy, at least in principle, may have the greatest domestic bias of all European nations. Government departments do not have relations with foreign suppliers; only a legally established domestic concern is eligible for a government contract.[280] Recent legislative enactments appear to have opened the door to foreign contractors but only on public contracts, and only then at the discretion of the public department.[281] The Defense Ministry may purchase needed defense items from abroad only when they are not available in Italy; a similar restriction has been placed on the State Railway system.[282] Although a foreign firm may be eligible to bid, a foreign bidder may be removed from the bidders' list pursuant to a unilateral, unannounced decision of the agency[283] or the agency may unilaterally exclude the bidder from a contract without any requirement for justification.[284]

9. *Luxembourg.* The State of Luxembourg has a very rigid purchasing system. If the foreign bidder's nation does not have a trade treaty with Luxembourg, the foreign bidder is not granted favorable treatment either with regard to the tendering or the granting of a contract.[285] In addition, the offeror must have a license to trade in Luxembourg in order to submit a bid, and this license is only issued to the nationals of countries having reciprocal trade arrangements with Luxembourg.[286] Finally, potential suppliers must prove that they have paid various taxes required by the Grand Dutchy.[287] If the supplier has thus qualified, he may be placed on the authorized bidders' list.[288]

10. Netherlands. In the Netherlands, as was true in France, there seems to be a difference between official policy and actual practice. Officially, an award is to be made irrespective of nationality; no rules exist that bar tenders from foreign firms or from a Netherlands' firm using foreign materials or offering foreign items.[289] In practice, open public tender is rarely used, except in an occasional public

280 DAM, *supra* note 197, at 204.
281 OECD, *supra* note 249, at 56.
282 *Id.*
283 DAM, *supra* note 197, at 203.
284 OECD, *supra* note 249, at 55.
285 *Id.* at 68.
286 *Id.*
287 Id. at 67.
288 Id.
289 *Id.* at 72.

works contract.[290] According to the United States Embassy in The Hague, these contracts are rarely awarded to foreign firms.[291] It is hard to determine the favoritism shown local firms because the Netherlands, like so many other countries, does not give out information on either bids or awards.[292]

Import duties must be paid in the normal manner and are considered in the evaluation of the bids.[293]

11. Norway. The Sorwegian Government has indicated that no special conditions are placed upon bidders, except that a Norwegian citizen must be named as an agent.[294] Norway chooses the bid considered most advantageous to the state; this rule encompasses such factors as price, transportation costs, quality, time of delivery, service and standardization, and is applied when choosing between several domestic bids or between domestic and foreign bids.[295]

Preoption may be afforded a domestic bidder when it is determined to be advantageous to the State[296] and this preferability is guised in the form of import duties and price differentials.[297] The exact amount of this differential depends upon the ratio of the import duty to the cost of the articles although it may not exceed twenty-five percent. If the ratio is a value less than 25 percent, the differential may be bolstered to the twenty-five percent maximum by the Ministry concerned, but this bolstering may not exceed fifteen percent.[298]

12. Portugal. The general rule in Portugal is that for the purpose of public tenders, foreign and domestic firms are treated equally. When a tender is selective, the Portuguese agencies do not keep a list of qualified bidders; they select, according to their own internal procedures, the firms who are to bid for the contract.[299] The foreign price will, however, be evaluated with the import duties added.[300]

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290 DAM, *supra* note 197, at 203-204.
291 *Id.*
292 *Id.* at 205.
293 OECD, *supra* note 249, at 73.
294 *Id.* at 76.
295 *Id.* at 77.
296 *Id.*
297 Map be up to 25%.
298 OECD, *supra* note 249, at 78.
299 *Id.* at 82.
300 *Id.* at 83.

13. Spain. Portugal's neighbor, Spain, has a much more concise policy. It states that:

> [I]n any works, installations, services and purchases carried out with, funds of the State provinces, municipalities, agencies and Delegations of the Movement, Monopolies, public-service concessions or firms receiving benefits or assistance in any administrative, economic or financial form, use will solely be made of goods manufactured in Spain, as evidenced by the national certificate of manufacture issued by the Ministry of Industry and Trade.[301]

Although exceptions to this policy exist, they require special dispensation from the Ministry before they may be implemented.[302]

14. Sweden. Import duties and the criteria of "advantage of the State" are the only preferences listed by the Swedish government in its dealings with domestic and foreign bidders.[303] What is meant by "advantage of the State" is not defined officially or unofficially, although the Swedish government states that all bidders are treated equally.[304]

15. United Kingdom. In the United Kingdom foreign firms are treated the same as domestic firms, and may be placed on departmental lists. It is noted, however, that because of high transport costs, national security and the need for adequate maintenance and spare parts few foreign firms are found on these lists.[305] Additionally, purchases of large amounts of goods from abroad require the approval of H. M. Treasury because the Government controls the spending of funds abroad. Although the Treasury has usually granted its permission, it continues to reserve the right to deny such a request based on an unfavorable balance of payments position.[306]

When a Commonwealth agency must go abroad for goods, it goes first to other Commonwealth nations; this is another obstacle which the foreign, non-Commonwealth bidder must overcome.[307] The United Kingdom has a predilection for development districts, similar in concept to our "labor surplus areas." If at all possible, these districts are to receive twenty-five percent of the contracts.[308]

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301 *Id.* at 88.
302 *Id.* at 88-89.
303 *Id.* at 93.
304 *Id.*
305 *Id.* at 105.
306 *Id.*
307 *Id.*
308 *Id.*

It is little wonder that few foreign firms are found on the British departmental lists.

D. JAPAN

Japan uses three types of contracts and all treat foreign and domestic firms alike.[309] There is no legislative requirement that a department choose a domestic product, although the Cabinet does urge agencies to "make due valuation of domestic products in government procurement activities." [310] Other than its tariff structure, Japan's one policy preference for domestic bidders is that if a domestic and foreign bidder are tied on the bid, the domestic bidder gets the contract."'

VIII. CONCLUSION

Buy-national legislation presently faces a 10.7 billion dollar balance of payments[312] deficit coupled with a procurement budget in excess of 47.5 billion dollars[313] which must operate in an international community that has been unable to reduce domestic preference in favor of open markets.[314]

Although present Buy American legislation is adequate and equitable in its effect upon foreign bidders, it is by no means satisfactory. Revision and expansion is needed in preferences granted solely to labor. The direct cost of labor must be given some weight in the evaluation of domestically assembled materials where those materials are of foreign origin. Under present policy, a final product domestically assembled from foreign components receives no better treatment than a final product consisting of the same components and assembled by a foreign manufacturer. That the domestic assembler should receive the same degree of preference as a domestic manufacturer is not the proposition advocated, but certainly some nod should be given in favor of the domestic laborer. Unlike the prevailing trend in the analysis of foreign nations' policies, this revision may not be accomplished without additional legislative enactments. Legislation in this neglected area would be a benefit, not a detriment, to the protective structure of the Act's

309 *Id.* at 61.

310 ***Id.***

311 ***Id.*** at **62. .**

312 REPORT TO THE CONGRESS RY THE COMPTROLLER GENERAL, ***supra*** note **179,** at 35.

313 *Id.*

314 Letter from James M. Frey to Cpt. Charles W. Trainor, dated Sovember 10, 1972.

buy-national intent. Such an amendment would require additional evaluation by the contracting officer, a few minutes more to determine the low, responsive, responsible bidder, but the results would justify the additional time required. This preference would require safeguards designed to prevent abuses for individual monetary gain. Moreover, it must be implemented in such a way to prohibit bidders from circumventing the Act's original objective of favoring domestic manufacturers in order that it may fulfill its purpose as a last resort to keep tax dollars at home.

The 92nd Congress proposed a great deal of legislation bolstering the buy-domestic policies under the present system. One bill attempted to raise the definitional percentage of a domestic item from fifty to seventy-five percent. This proposal would demand that seventy-five percent of the components be mined, grown, manufactured, or produced in the United States.

Although this was within the Act's tolerances and nonviolative of the Act's legislative history, it would most assuredly result in domestic industry gaining a greater fraction of the procurement market; thus, it appears to be shortsighted. What it fails to do is to recognize the finite supply, ever decreasing, of the world's natural resources and products, specifically those of the United States. As the recent oil and wheat shortages have vividly pointed out, the great wealth of the world is rapidly dwindling with nations becoming more dependent on each other. To become isolationist, as the House Resolution suggests, would be the death knell of our national resources and productivity.

As the rules of supply and demand quickly escalate the cost of domestic items far beyond the grasp of any domestic producer, they inhibit domestic source items from competing favorably with those of the rest of the world. The raw material exception, contained in ASPR 6-105, would help to alleviate this problem area, but it could defeat the intended legislative purpose—to allow these critical items to come from abroad in ever increased amounts would undermine the very purpose of the legislation.

This same goal could be achieved on a more equitable basis by a return to the Act and the supportive Executive Order. The national security section of the Executive Order would allow the departmental secretaries to adopt a greater differential favoring domestic items without the permanence or the inflexibility of a legislative enactment. When, and if, prices rose to an intolerable level, the public interest exception could be used to reduce the cost as needed.

Through the proper implementation of the Act and the Executive Order, almost any protectire measure can be undertaken without the necessity of enacting legislation. The Berry Amendment, specifically designed to protect the textile industry, is an example of superfluous legislation.

What the Amendment's enactment proves is that the legislators and principal implementers of the Act do not understand its provisions. The 1962 memorandum of Secretary of Defense, setting forth certain mandatory buy-national restrictions using price as a guideline, can be singled out as violative of the Act by anyone familiar with the legislative history of the 1933 legislation. 'This type of conduct was specifically rejected, yet 30 years later it was put into practice.

A liberal interpretation of the provisions of the amended 1933 Act directs American tax dollars back into the domestic market without additional legislation. The concept of a Buy-American policy is excellent, the legislation fairly complete, the' application poor. Employment of the proper principles would allow the United States to remain a party in good standing with respect to those international trade agreements to which it has acceded. At the same time, the United States can achieve the necessary domestic stability desired by the Act's proponents and supporters. The Act is far from being a Utopian legislative achievement, but it is the only legislation we have.

FOREIGN MILITARY LAW COMMENTARY

With this offering we resume a series of articles about foreign military legal systems.

It is our hope that these articles, made available through the cooperation and scholarship of our legal colleagues in foreign military legal services, will be of interest to English-speaking scholars.

THE MILITARY JUDICIAL SYSTEM OF THAILAND*

Lieutenant General Sming Tailangka**

I. INTRODUCTION

On the scene of Thai history, during the early Chakri dynasty of the Bangkok era (1782-1892), military courts appeared in a row of several kinds of courts under various departments of the Government. The jurisdiction of the courts corresponded to the functions of their respective departments; for example, the Court of the Na (paddy field) department had jurisdiction over cases relating to paddy lands and cattle, while cases involving persons subject to the Kalahom (military or defense) Department were tried by the Kalahom or military courts.

In 1892, all the traditional departments were replaced by western-style Ministries including the Ministry of Defense and the Ministry of Justice, and all of the courts were subsequently brought under the single authority of the Ministry of Justice, save the military courts which remained under the Ministry of Defense.

In **1932,** the form of government of Thailand was changed from one under absolute monarchy to one under written constitution, having a King as the Head of State. However, the change was not followed by any major innovation in the judicial system. At present, under the series of Constitutions that have been in force since 1932, the judicial power is exercised by the courts duly established by law and in the name of the King. **As** for the military judicial system, with the combination of the Army and the Navy courts

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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in 1934 and the reorganization in 1955, the military court organization took the form in which it appears today.

11. CLASSIFICATION OF MILITARY COURTS

Under the Act on the Organization of Military Court, 1955, which is still in force, the military courts of first instance are classified as Alilitary Changwat (province) Courts, Military Circle Courts, Bangkok Military Court and Military Unit Courts. The two Appellate Courts are the Xlilitary Court of Appeals (the intermediate court) and the Military Supreme Court where all appeals from all the military courts of first instance throughout the country are heard.

To avoid being complicated, it is necessary to note here that in Thailand the term "Military Court" is generic, referring to all types of courts under the law on the Organization of Military Courts, while the term "Court-Martial" is reserved for a type of military court that is set up when a military unit or a warship is located in the area of operations.

Of all the military courts of first instance, the Military Changwat[1] Courts are the smallest in jurisdiction. In the cases where the law does not provide a maximum penalty or provides a minimum penalty of not exceeding one year imprisonment or fine not exceeding Two Thousand Baht? or both not exceeding such extents, the Military Changwat Courts, if they think fit, may enter judgments dismissing cases or inflicting upon the accused the punishment of not exceeding one year imprisonment for each count or imposing a fine not exceeding Two Thousand Baht or both not exceeding such extents. Cases over which the hlilitary Changwat Courts have no judgment power, the courts shall submit their opinions together with the files to the Circle[3] Military Court or the Bangkok Military Court, as the case may be.

III. COMPOSITION OF MILITARY COURTS

In the military courts, except courts-martial, a quorum for trial and adjudication is filled by a combination of two types of judges. Any commissioned officer of any of the Armed Forces is eligible to sit as a first-type judge of any military court, provided that he has a military rank in accordance with the category of the court

[1] Editor's note: Changwat = Province.
[2] Editor's note: One Baht = approximately $.005.
[3] Editor's note: Regional Military Headquarters.

as required by law. For example, in a military court of first instance, a first-type judge must be a company grade officer or higher and his rank not below that of the accused.

A judge of the second type is a qualified lawyer who holds the position of "Phra Thammanoon Judge" which may be compared with a US military judge or a judge of The Judge Advocate General's Staff.[4] The tasks of the second-type judge are not only to prepare and pronounce judgments but also to superintend the trial and advise other judges on points of law and procedure. Moreover, he records the testimony as given in court.

A quorum of a military court of first instance consists of two first-type judges and one second-type judge. **As** regards the Military Court of Appeals and the Military Supreme Court, such proportions are respectively three to two and two to three.

It should be noted that no judge of the second type was ever required in the Military Changwat Courts until the amendment of the Act on the Organization of Military Courts by the end of **1972.** And although now there is no law or regulation requiring a second-type judge to be assigned to conduct a court-martial practice necessitates a second-type judge to sit as one of the three first-type judges of the court-martial.

IV. APPOINTMENT OF JUDGES

The King appoints and removes judges of the Military Supreme Court and Military Court of Appeals. The power to appoint and remove judges of the Bangkok Military Court has been delegated to the Minister of Defense. **As** for the Military Circle Courts, Military Changwat Courts and Military Unit Courts, such power has been delegated to the person who has a power to command the respective Military Circle, Changwat, or Unit as the case may be. The persons empowered to appoint judges may appoint officers out of the service to be judges.

The power to appoint and remove judges of a court-martial has been delegated to the Supreme Commander of the Armed Force, not less than battalion strength, or a joint force; or the officer in command of a warship, fortress or any other stronghold; or the person acting on his behalf.

The appointment of judges may be particularly made for a case as it arises, but now in every military court it tends to be made yearly in a list. Judges so appointed in the latter manner are practicable

[4] Editor's note: Comparable to the United States Court of Military Review.

and interchangeable, among their own specified type, to act upon any case of the court.

V. JURISDICTION OF MILITARY COURTS

A. JURISDICTION AS TO PERSONS

Members of any of the Armed Forces or other departments of the Ministry of Defense are equally subject to military law; however, they are also subject to the laws of the state in the same manner as ordinary citizens are. The following persons are subject to the jurisdiction of the military courts:

(1) Commissioned officers in active service.
(2) Commissioned officers out of service, but only in the case where they fail to comply with any order or regulation under the Military Criminal Code.
(3) Noncommissioned officers and servicemen, conscripted or in active service or other persons in militarv service under the laws relating to military service.
(4) hlilitary cadets as designated by the Alinistry of Defense.
(5) Conscripts placed in regular service and received by the military authorities for the purpose of transferring to active. dutv in a military unit.
(6) Civilians in military service, but onlv in the case n-here thev commit an offense relating to their militarv duties; or other offenses in or within the precincts of any building, site of military unit, bivouac, camp, vessel, aircraft or 'any other vehicle under the control of the military authorities.
(7) Persons lawfully detained or kept in custody of the militarv authorities.
(8) Prisoners of war or enemy aliens in the custodv of the military authorities.

Some military courts have limited jurisdiction as to the rank of the accused; Military Changwat Courts have no jurisdiction over the case in which the accused are commissioned officers, but it is triable by a Military Circle Court or the Bangkok Military Court, as the case may be; Alilitary Circle Courts and Militarv Unit Courts have no jurisdiction over the case involving general grade officers and their equivalent, but it is triable by the Bangkok Military Court.

It is interesting to note here that all offenses committed during military service are triable by the military courts, even if the offense is discovered after the offender has been discharged from

the military service. Additionally, the military courts may punish for contempt of court any person who commits contempt of court as provided in the Civil Procedure Code, even though he is not subject to military law.

B. TERRITORIAL JURISDICTION

The country is divided into seven military circles and twenty-two military changwats (provinces). In every military circle there is one Military Circle Court, except in the first military circle where the Bangkok Military Court is established; similarly, in every military changwat there is one Military Changwat Court, except in certain military changwats where the Military Circle Headquarters are established.

The Military Circle Courts and Military Changwat Courts, therefore, exercise their jurisdiction in all criminal cases within the area of their respective military circle or military changwat. Of all the military courts of first instance, the Bangkok Military Court is the biggest, having unlimited criminal jurisdiction. It acts not only for cases within the first military circle, but also for criminal offenses committed on the high seas and elsewhere outside the Kingdom but triable in the Kingdom, and those committed in other military circles. But ordinarily, if an offense occurs in a locality where there is a military court, the trial shall be held in the military court of that locality.

Since the Military Unit Courts are set up when a military unit of not less than battalion strength is on duty abroad or traveling for duty abroad, they have criminal jurisdiction over persons in the military unit without limitation as to territory.

The courts-martial have jurisdiction over all criminal cases which arise within the area of responsibility of the military unit or joint force, as the case may be, under every provision of the law and without limitation as to persons.

VI. RELATION BETWEEN MILITARY AND CIVILIAN COURTS

Cases which do not lie within the jurisdiction of the military courts must be tried in the civilian courts. A case which a civilian court has accepted for trial, although it later appears from the proceedings to lie within the jurisdiction of the military courts, shall be continued to be tried and adjudicated in the civilian court.

The following cases, even though the offender is subject to military law, do not lie within the jurisdiction of the military courts:

(1) Where the offense is committed jointly by a person subject to military law and a person not subject to military law;
(2) Where the case involves another case which lies within the jurisdiction of the civilian courts;
(3) Where trial must be held in the juvenile courts; and
(4) Where the military courts deem that they do not have jurisdiction.

The civilian courts play the role of the military courts when the country comes under the state of martial law. The person authorized to proclaim martial law may make an announcement, or the Supreme Commander may give an order, authorizing military courts to have jurisdiction over citizens generally in certain criminal cases as specified in the announcement or the order, if the offense is committed in the area where martial law is in force. At the same time civilian judges, prosecutors, and clerks are appointed to positions in the military courts; and the civilian courts, in consequence, act as military courts of such offense in addition to their normal jurisdiction. But for reasons of national security, treason and offenses under the Anti-Communist Activities Act, wherever committed, are to be tried by the military courts under the Ministry of Defense.

A civilian court cooperates with a military court in a criminal case in which the accused, after judgment by the military court, is ordered to return property or pay the value thereof or the compensation for damages to the Government. On motion of the military prosecutor to seize the property of the accused, the person empowered to appoint judges shall send the file of the case to the civilian court in the locality where the accused's property is situated for further action to obtain payment.

In giving judgment in civil cases, the civilian courts are bound by the facts as found in a judgment of the military court in a criminal case.

VII. CRIMINAL PROCEEDINGS IN MILITARY COURTS

Proceedings in criminal cases in all military courts are governed by the laws, rules and regulations issued under military law. In case there is no such military law, rule or regulations, the Criminal Procedure Code shall apply *mutatis mutandis*. If a particular point

is not provided for in the Criminal Procedure Code, then the Civil Procedure Code shall be applied as far as possible.

After a prosecution order has been made, the military prosecutor will prosecute the alleged offender in court. However, in a normal period, an injured person who is under the jurisdiction of the court is entitled to institute a criminal prosecution and to appoint counsel; but an injured person may by no means submit a motion to have the accused restore the property, the value thereof or pay the compensation for damages.

In a military court in either a normal period, or in an abnormal period, *i.e.*, in a period of fighting or war or while martial law is in effect, the accused may appoint counsel; but in an abnormal period court in certain offenses under the Military Criminal Code and the Penal Code, and offenses of acting as communists, appointment of counsel is prohibited.

Counsels may be civilian advocates or officers who have graduated in law; the latter must have the permission of the commanding officer of a battalion or above. The military prosecutor or counsels may follow the cases to the Military Court of Appeals and Military Supreme Court.

From the date the judgment has been pronounced, either or both parties may lodge an appeal against the judgment of the court within fifteen days to the Military Court of Appeals or Military Supreme Court, while persons empowered to appoint judges or persons empowered to give punishment orders may do so within thirty days. No appeal may be made in the cases where appointment of counsel is prohibited.

It is interesting to note that before the amendment to the Act on the Organization of Military Court of 1968 no appeal could be lodged against judgment of the abnormal period courts and the courts-martial. Appointments of counsel in such courts were also prohibited. At present, such restrictions remain only in the courts-martial.

VIII. EXECUTION OF JUDGMENT

Before the amendment to the Law on the Organization of the Military Courts of 1955 the judgment of a military court could not be executed until it had been approved by the person empowered to order punishment. At present, upon finality of the judgment, the court shall send notice of final judgment to the person empowered to sign an order of punishment attached thereto in

order that it be sent to the prison authorities for the execution of the sentence indicated therein.

In the case of punishment of death or iniprisonment for life, where according to the law appeal can be made, it is the duty of the military court of first instance to send the file of the case to the Alilitary Courts of Appeals, even though there was no appeal against the judgment. Such judgment does not become final unless it has been confirmed by the Military Court of Appeals.

Under the Criminal Procedure Code, the execution of imprisonment shall be suspended until special circumstances, such as insanity of the accused, have ceased to exist. In cases where the accused is sentenced to death he cannot be executed until sixty days have elapsed from the date of hearing the judgment; provided that, in the case where there is a petition or a recommendation for pardon, the execution shall be suspended until after the expiration of a period of sixty days from the date on which the Minister of Interior submits the petition or recommendation to the King. But if the King rejects the petition, the execution may take place before the expiration of the said period.

A judgment of a court-martial shall be executed immediately by the person empowered to give punishment orders except in a cash where a person who is sentenced to death is a pregnant woman, the execution of the sentence shall be suspended until after her delivery.

IX. CONCLUSION

Classification of military courts in accordance with the different situations, *i.e.*, normal and abnormal periods, becomes apparently less important since the prohibitions and restrictions relating to counsels and appeals were mostly abolished. The proceedings in the normal period courts and the abnormal period courts are nearly the same, even in cases where the civilian courts act as the military courts when the country comes under the state of martial law. During the last two decades, substantial improvements in the military judicial system have been made by a number of laws, rules and regulations to meet the need of the Armed Forces and their members in the field of military justice. The latest changes include the appointment of the lawyers of the Judge Advocate General's Staff to the Military Changwat Courts throughout the country.

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*Mention of a work in this section does not preclude later review in the ***Military** Law **Review.***

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